80-565

No. 80-.....

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1980

AMELIA FLOHR HEYL, As Personal Representative of the Estate of Nancy Zimmerman, Deceased, and As Guardian of Kim Ann Zimmerman and Lisa Marie Zimmerman, Minors,
Petitioner/Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Respondent/Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

There is but one main legal issue presented which can be framed in several ways, to-wit:

> When a person (a non-seaman) suffers wrongful death at the hands of a tortfeasor whose citizenship is diverse from that of the decedent and the decedent's personal representative, such that the estate would ordinarily be entitled to sue on the civil side of the federal court under the diversity statute and receive a trial by jury, would the additional fact that the death happened to occur on the high seas such that admiralty jurisdiction could also be relied upon under D.O.H.S.A. mean that the estate may no longer choose to rely exclusively on the diversity statute but now must rely only on D.O.H.S.A. as the sole basis of federal jurisdiction thereby requiring the estate to proceed only in admiralty and forego a trial by jury?

RESTATED: Did the Fifth Circuit Court of Appeals erroneously interpret this Court's decision in *Mobil Oil Co. v Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010 (1978) to mean that D.O.H.S.A. (Death on High Seas Act) is the sole basis of federal jurisdiction whenever a death occurs on the high seas, to the exclusion of any other *statutory* basis of civil jurisdiction such as the diversity of citizenship statute?

RESTATED: When a person (a non-seaman) is the victim of alleged medical malpractice by a ship physician and expires while on the high seas, and the estate sues in Federal Court and seeks to rely only on diversity jurisdiction in order to receive a jury trial, when there is in fact diversity of citizenship, would the Federal Court lack civil jurisdiction merely because of the existence of D.O.H.S.A. which provides a remedy in admiralty?

RESTATED: Did Congress intend for D.O.H.S.A. to preempt all other Federal jurisdictional statutes including the much older diversity of citizenship statute?

Pursuant to Supreme Court Rule 21, Petitioner states that the caption of this case already includes all parties in this case as it stood before the United States Circuit Court of Appeals for the Fifth Circuit.

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REFERENCE TO DECISION ON APPEAL

Pursuant to Supreme Court Rule 21, Petitioner would refer this Honorable Court to the Appendix "K" which contains a conformed copy of the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which opinion Petitioner now seeks to have this Honorable Court review by certiorari. The several orders entered by the Federal District Court which pertain to the question presented here are contained in the appendix (hereinafter abbreviated "APP.") at APP. "D", "E", and "H".

STATEMENT OF GROUNDS UPON WHICH CERTIORARI JURISDICTION OF THIS COURT IS INVOKED

A.

Date of Decision Sought to Be Reviewed

The decision of the United States Circuit Court of Appeals for the Fifth Circuit, which Petitioner seeks to have reviewed by this Honorable Court, is dated and was entered August 20, 1980. (See APP. "K").

B.

Date of Order on Rehearing

There has been no Motion for Rehearing filed with the United States Circuit Court of Appeals for the Fifth Circuit. There has been no order granting an extension of time to file this Petition for Certiorari, which is timely filed without the need for an extension.

C.

Statutory Provision Believed to Confer on This Court Jurisdiction to Review by Certiorari

Petitioner relies upon 28 U.S.C. §1254 (1) and 28 U.S.C. §2101 (c).

D.

Constitutional and Statutory Authorities Involved

46 U.S.C. §761 - Right of Action; Where and by Whom Brought.

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high

seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

28 U.S.C. §1332 - Diversity of Citizenship; Amount in Controversy; Costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between -

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. §1333 Admiralty, Maritime and Prize Cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. §765 Death of Plaintiff Pending Action.

If a person dies as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

46 U.S.C. §688 Recovery for Injury to or Death of Seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

28 U.S.C. §1254 (1) Courts of Appeals; Certiorari; Appeal; Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. §2101 (c) Supreme Court; Time for Appeal or Certiorari; Docketing; Stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

E.

Statement of the Case and Facts

I. Facts

The single issue presented to this Honorable Court is purely one of law and does not require a detailed recitation of facts. The essential facts which relate to the issue, omitting unnecessary detail, are as follows.

This case involved an alleged wrongful death. The actual death occurred on the high seas, although certain alleged negligent acts preceding the death occurred both on the high seas and on dry land in the United States of America. The facts stipulated to by both parties (see R. 212) are:

1. On April 9, 1977, Nancy Zimmerman, age 42 years, boarded a luxury cruiseliner, the TSS Carnivale, which ship was operated by Carnival Cruise Lines, Inc. She was a fare-paying passenger taking a pleasure cruise originating out of the Port of Miami.

2. Upon becoming ill, Mrs. Zimmerman was examined and treated by the ship's physician.

3. On April 11, 1977, Mrs. Zimmerman was discovered dead in her cabin. At this time the ship was on the high seas.

4. Mrs. Zimmerman is survived by two minor daughters. Amelia Flohr Heyl is the administratrix of the estate of Nancy Zimmerman.

II. Proceedings

On March 30, 1978, Amelia Flohr Heyl, as Personal Representative of the estate and guardian of the minor daughters, filed a complaint for wrongful death against Carnival Cruise Lines. (APP. "A"; R. 1-4). In the orig-

inal complaint Plaintiff alleged federal jurisdiction by virtue of the Death on the High Seas Act, 46 U.S.C. §761, et seq. (the original complaint contained an incorrect statutory citation) and general maritime law. Plaintiff alleged Defendant was vicariously liable for the negligence of the ship physician in failing to properly diagnose and treat Plaintiff's decedent, and Plaintiff also alleged Defendant was directly liable for its own negligence for negligent hiring of the ship's physician and negligently equipping the ship with inadequate medical facilities, instruments and personnel. (APP. "A"; R. 1-4. See also R. 213). Plaintiff's complaint specifically demanded trial by jury. (APP. "A"; R. 4).

Pursuant to Plaintiff's complaint the court scheduled a jury trial to begin April 3, 1979. (R. 42). Defendant then filed a Motion to Strike and supporting memorandum, requesting an order striking Plaintiff's demand for jury trial and a rescheduling of the cause for a non-jury trial. (R. 46-48). Plaintiff filed its Opposition to Defendant's Motion to Strike (APP. "C"; R. 78) and filed a Motion for Leave to File an Amended Complaint, restating paragraphs 2-4 of the Complaint so that jurisdiction is pled only on the basis of diversity of citizenship under 28 U.S.C. §1332. (APP. "B"; R. 79-81). No other substantive amendment to the complaint was requested; Plaintiff merely sought to change the basis for invoking federal jurisdiction. Plaintiff, Amelia Flohr Heyl, was a citizen of Texas, as was the decedent and the estate was being probated in Texas; and Defendant was a non-Texas corporation with its principal place of business in Miami, Florida; so there was in fact complete diversity of citizenship. (See R. 38, 39, 222, 61). Defendant has never denied that diversity does exist. Defendant filed a Reply in Opposition to Plaintiff's Motion to Amend. (R. 83-88).

The District Court denied Plaintiff's Motion to Amend the Complaint in order to bring the case exclusively under the Court's diversity jurisdiction, and the Court granted Defendant's Motion to Strike Plaintiff's demand for jury trial, and ordered the cause to proceed to trial without a jury. (APP. "D"; R. 90-91). This order was entered February 8, 1979, and the Court specifically stated "Plaintiff's exclusive remedy is under the Death on the High Seas Act." The Court expressly refused to allow Plaintiff to disclaim admiralty jurisdiction as alleged in the original complaint and no suggestion was made to file supplemental memoranda or to raise the issue again for reconsideration.

The pretrial stipulation (R. 210) was filed on March 8, 1979. This was one month after the February 8, order which specifically instructed Plaintiff that her exclusive remedy and basis for federal jurisdiction was D.O.H.S.A. and she could *not* base jurisdiction on diversity. Therefore Plaintiff was compelled to accept the Court's ruling and indicate on the pretrial stipulation that the basis of federal jurisdiction was the Death on the High Seas Act (D.O.H.S.A.) 46 U.S.C. §761, et seq. and 28 U.S.C. §1333.

At the pretrial conference Plaintiff orally renewed her Motion to Amend the complaint regarding the basis of federal jurisdiction, Defendant filed a written reply (R. 255-257), and the Court again refused to allow a trial by jury, however, the Court permitted the cause to be brought under D.O.H.S.A. and general maritime law. (APP. "E"; R. 261-263).

The cause was tried, without a jury, before the Honorable District Judge Charles B. Fulton, as the sole finder of fact. In a Memorandum Opinion filed by the Court on October 10, 1979 (APP. "F"; R. 442-449), the Court found that Mrs. Zimmerman died from internal bleeding caused

by a ruptured spleen, and that, although the ship's physician had diagnosed her condition as simple sea sickness shortly before her death, under the circumstances Plaintiff had not demonstrated by a preponderance of evidence that Mrs. Zimmerman's spleen had already ruptured at the time she was treated by the ship's physician, and Plaintiff failed to prove negligence on the part of the physician or negligent hiring of the physician which was a proximate cause of the death.

Plaintiff timely served a Motion for New Trial and supporting Memorandum on October 17, 1979 (APP. "G"; R. 450-458) which argued that the Court erred in refusing to allow Plaintiff to amend her complaint to disclaim admiralty and to allege diversity of citizenship as the sole basis of federal jurisdiction and erred in striking Plaintiff's demand for jury trial and denying Plaintiff a trial by jury. Defendant filed a Memorandum in Opposition to Plaintiff's Motion for New Trial. (R. 459-462).

On November 6, 1979, the Court entered an order denying Plaintiff's Motion for New Trial (APP. "H"; See also Supplemental Record on Appeal) and on the same day the Court entered Final Judgment in favor of Defendant. (APP. "I"; Supplemental Record). Plaintiff timely filed Notice of Appeal on December 3, 1979, from the Order Denying Plaintiff's Motion for New Trial and from the Final Judgment. (APP. "J"; R. 463). Only one issue was raised on appeal and both parties agreed that a transcript of the non-jury trial was not necessary or pertinent to dispose of the single legal issue raised on appeal. Briefs were timely filed with the United States Circuit Court of Appeals for the Fifth Circuit, and Appellant framed the issue on appeal as follows:

> Whether the Lower Court Erred In Striking Plaintiff's Demand for Trial by Jury and Denying Plaintiff's Mo-

tion to Amend Its Complaint to Allege Diversity of Citizenship as the Sole Basis of Federal Jurisdiction When no Prejudice to Defendant was Alleged by Defendant or Found by the Court, but the Sole Basis for Denying an Amendment to the Complaint was that it Would be Futile Since Plaintiff Would Still not be Entitled to a Trial by Jury?

On August 20, 1980, the Fifth Circuit Court of Appeals entered a written opinion. (APP. "K"). The Court of Appeals affirmed the District Court on the reasoning that Plaintiff did not have the right to elect to proceed under diversity jursidiction because the death occurred on the high seas and this Court held in *Mobil Oil Corp. v Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1978), that D.O.H.S.A. provides the exclusive remedy for death on the high seas; therefore, since this case could only be brought in federal court under D.O.H.S.A. it was properly tried in admiralty without a jury and no amendment to the complaint could have changed this result.

Plaintiff has now timely petitioned for this Honorable Court's discretionary certiorari review of the opinion and decision of the Fifth Circuit Court of Appeals.

III. Argument Supporting Allowance of the Writ (Including Summary of Argument Presented on Appeal tc the Fifth Circuit)

While it would not be appropriate to fully argue the merits until this Honorable Court so orders, Petitioner believes it would be helpful for this Court to understand the general thrust of her position before the Fifth Circuit in order to fully appreciate the public importance of the issue presented by this petition. Thus, a summary of Petitioner's argument to the Fifth Circuit follows.

The District Court denied Plaintiff's requested amendment to the complaint only on grounds that it would be a futile effort to obtain a jury trial; there was never any question or finding regarding timeliness of the request or prejudice to Defendant or any other equitable consideration which would make the amendment unfair to Defendant. See *Foman v Davis,* 371 U.S. 178, 83 S.Ct. 227 (1962).

On appeal Plaintiff discussed the traditional election given to a Plaintiff to file the case in admiralty and receive the special benefits of admiralty procedure and remedies but sacrifice a jury trial, or to file the case solely under a viable independent basis of federal jurisdiction which is heard on the civil side of the Court with a trial by jury and thus sacrifice admiralty remedies and procedures. Plaintiff discussed the "Saving to Suitors" statute, 28 U.S.C. §1333, which vests federal courts with admiralty or maritime jurisdiction, with the proviso that it is "saving to suitors in all cases all other remedies to which they are otherwise entitled." Plaintiff cited federal cases which have relied on the "Saving to Suitors" statute and have held that, in diversity suits for wrongful death occurring on the high seas, the decedent's estate has the traditional election to proceed on the civil side of the Court under diversity jurisdiction or on the admiralty side of the Court under D.O.H.S.A. See e.g. *Safir v Compagnie Generale Transatlantique,* 241 F.Supp. 501 (E.D. N.Y. 1965); *Sierra v Pan American World Airways,* 107 F.Supp. 519 (D. P.R. 1952). See also *Lowe v Transworld Airlines, Inc.,* 396 F.Supp. 9 (S.D. N.Y. 1975). See also the recent decision in *Rairigh v Erlbeck,* 488 F.Supp. 865 (D. Md. 1980).

This traditional election of remedies, which has been codified in Federal Rule of Civil Procedure 9 (h), has been relied upon by a number of federal appellate and trial courts which Plaintiff cited below as federal cases which

recognize a Plaintiff's right to elect to sue on the civil side of the Court under diversity jurisdiction and receive a jury trial even though the action could also be brought on the admiralty side of the Court. E.g. *Peace v Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969); *Allen v Matson Nav. Co.*, 255 F.2d 273 (9th Cir. 1958); *Johnson v Venezuelan Line S.S. Co.*, 314 F.Supp. 1403 (D.C. La. 1970); *Ballard v Moore-McCormack Lines, Inc.*, 285 F.Supp. 290 (D.C. N.Y. 1968); *Mazella v Pan Oceanica A/S Panama*, 232 F.Supp. 29 (D.C. N.Y. 1964); *Gvirtsman v Western King Co.*, 263 F.Supp. 633 (D.C. Cal. 1967).

This election of remedies has previously been recognized by the Fifth Circuit. See *Romero v Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975); *Harrison v Flota Mercante Gran Columbiana*, 577 F.2d 968 (5th Cir. 1978); *Green v Ross*, 481 F.2d 102 (5th Cir. 1973); *Doucet v Wheless Drilling Co.*, 467 F.2d 336 (5th Cir. 1972); *Johnson v Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972).

Indeed, this Honorable Court has held that a maritime suit which may be brought in admiralty may also be pursued as a civil action on the basis of diversity jurisdiction, and doing so preserves the right to a jury trial. *Atlantic and Gulf Stevedores, Inc. v Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780 (1962). This case was also cited to the lower courts. The Plaintiff's initial identification of the claim as an admiralty claim is not an irrevocable election which cannot thereafter be amended. *Doucet*, supra; *Mazella*, supra; Fed. R. Civ. P. 9 (h).

Petitioner believes the above cases create a conflict, which is one of the grounds upon which Petitioner now seeks certiorari review.

There is no language in D.O.H.S.A. which can be construed to preempt other viable independent federal jurisdiction statutes simply because a death occurs on the

high seas. Congress stated in 46 U.S.C. §761 (D.O.H.S.A.) that the personal representative "may" maintain a suit in admiralty; rather than "shall."

The Fifth Circuit Court of Appeals apparently interpreted this Court's decision in *Mobil Oil Co. v Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010 (1978) as impliedly overruling the various authorities cited above. However, Petitioner would submit (if the merits of this case are reached) that the Fifth Circuit has expanded *Higginbotham* and carried it far beyond that which was intended by this Court. *Higginbotham* did not address the right to trial by jury, nor the issue of diversity in a maritime wrongful death case, nor the question of whether D.O.H.S.A. was intended to preempt another viable *statutory* basis for recovery in federal court. In *Higginbotham* this Court merely held that in an action for wrongful death on the high seas the measure of damages provided by D.O.H.S.A. preempts any conflicting measure of damages allowable under *nonstatutory* general maritime law.[1] This is sensible since, by enacting a statute (D.O.H.S.A.), Congress may be presumed to have intended the new statutory remedy to supersede a previously recognized *nonstatutory* remedy which was created by the courts to provide relief until Congress acted.

However, Petitioner in the present case was not seeking to invoke substantive remedies available under nonstatutory General Maritime Law which conflict with D.O.H.S.A. Rather, she was seeking to invoke the federal

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1. Whether the helicopter that crashed on the high seas in *Higginbotham* actually had a sufficient nexus with traditional maritime activity so as to enjoy the protection of General Maritime Law, may be subject to dispute. This could serve as an independent basis for the *Higginbotham* court to find D.O.H.S.A. the exclusive remedy in that case. See *Higginbotham,* supra at 98 S.Ct. 2012, n. 2; and see *Executive Jet Aviation, Inc. v City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

civil procedure which is available under another federal *statute* (28 U.S.C. §1332) whenever there exists complete diversity of citizenship and the claim exceeds $10,000.00. Unlike the judicially created general maritime wrongful death action discussed in *Higginbotham,* supra, the diversity statute is a legislatively mandated federal forum which has existed much longer than D.O.H.S.A. (as has the "Saving to Suitors" statute enacted by the same Congress that enacted the diversity statute for the purpose of preserving diversity jurisdiction in admiralty cases).

It is settled that, as for a seaman who dies on the high seas, D.O.H.S.A. is not the exclusive remedy and the personal representative may elect to sue in admiralty under D.O.H.S.A. or on the civil side under the Jones Act, 46 U.S.C. §688, and receive trial by jury. *Peace v Fidalgo Island Packing Co.,* 419 F.2d 371 (9th Cir. 1969); *Doyle v Albatross Tanker Corp.,* 367 F.2d 465 (2d Cir. 1966); *Gvirtsman v Western King Co.,* 263 F.Supp. 633 (D.C. Cal. 1967); *Petition of Risdal & Anderson, Inc.,* 291 F.Supp. 353 (D.C. Mass. 1968). It would seem incongruous that the estate of a seaman killed on the high seas could receive a jury trial under the Jones Act but the estate of a deceased passenger aboard the same ship could not under the diversity statute. A case of "Selective Preemption?" If *Higginbotham* was properly construed by the Fifth Circuit below then, logically, the estate of a deceased seaman killed on the high seas can no longer receive a jury trial since Jones Act remedies are also excluded by D.O.H.S.A. However, it was the same Congress that enacted D.O.H.S.A. and the Jones Act. Did that Congress intend to give with one hand and take away with the other? The present case is of great importance to seaman and nonseaman alike.

Lastly, Plaintiff argued below that some of her claims do not even fall within D.O.H.S.A.; they can only be premised on diversity. Under 46 U.S.C. §761, D.O.H.S.A.

only applies when the negligent act which causes the death occurs on the high seas; it is not sufficient that the death alone occurred on the high seas. *Lacey v L.W. Wiggins Airways, Inc.*, 95 F.Supp. 916 (D. Mass. 1951). See also *Sea-Land Services, Inc. v Gaudet*, 414 U.S. 573, 599, 94 S.Ct. 806, 822 (1974) (Powell, Burger, Stewart and Rehnquist dissenting). It is not even necessary that death occur on the high seas if the negligent act occurred on the high seas. See 46 U.S.C. §765. Here, the death occurred on the high seas as did any negligence of the ship physician, however, the complaint alleged in addition to vicarious liability for the negligent diagnosis and treatment by the ship physician, direct liability of the cruiselines by negligent hiring of the ship physician and negligently equipping the ship with inadequate personnel, facilities and instruments. (APP. "A"; R. 1-4, See also R. 213). The allegations of direct liability fall outside D.O.H.S.A. and can only be premised under the diversity statute.

Reasons for Issuance of the Writ

In summary, Petitioner earnestly believes the following reasons, in the order of priority, warrant this Honorable Court to issue its discretionary writ of certiorari and to consider the merits of this case:

1. The Fifth Circuit Court of Appeals has decided a very important question of federal jurisdiction which since the *Higginbotham*, supra, case has not been, but should be, settled by this Court. The single issue presented in this case is of great public importance (to seamen and nonseamen alike) as it has implications far beyond the present case; indeed it affects the right to trial by jury in every maritime wrongful death case where death occurs on the high seas and when there exists an independent basis of federal jurisdiction other than D.O.H.S.A., under which the litigant may choose to proceed in lieu of D.O.H.S.A.

2. The Fifth Circuit Court of Appeals has decided a question of federal law in a way which is in conflict with applicable decisions of this Court and other federal courts of appeals, and even previous decisions of the Fifth Circuit.

3. The Fifth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the United States District Court, as to warrant the exercise of this Court's power of supervision.

4. The Fifth Circuit Court of Appeals has misinterpreted and misapplied this Court's decision in *Higginbotham,* supra, by expanding the narrow holding in *Higginbotham* and carrying it far beyond that which was intended by this Court.

CONCLUSION

This Honorable Court should issue its discretionary writ of certiorari and order the parties to file briefs on the merits for plenary consideration.

Respectfully submitted,

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By RICHARD A. KUPFER

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that three true copies of the foregoing Petition for Writ of Certiorari have been served by First Class U.S. Mail on all parties required to be served, to-wit: ELIZABETH K. HOOK, ESQ., Smathers and Thompson, Counsel for Respondent Carnival Cruise Lines, Inc., 1301 Alfred I. duPont Building, Miami, Florida 33131, this ..... day of ....., 1980.

A. WARD WAGNER, JR.

RICHARD A. KUPFER

APPENDIX

APPENDIX OF PETITIONER/PLAINTIFF

Date Filed or Served	Instrument	
3/30/78	Plaintiff's Complaint	A2
1/24/79	Plaintiff's Motion for Leave to File Amendment to Complaint	A6
1/24/79	Plaintiff's Opposition to Defendant's Motion to Strike	A8
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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 78-8090-CIV-CF

AMELIA FLOHR HEYL, As Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, Minors,
Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

COMPLAINT

(Filed March 30, 1978)

COMES NOW the Plaintiff, AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, deceased and AMELIA FLOHR HEYL as guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, by and through their undersigned attorneys, and sues the Defendant, CARNIVAL CRUISE LINES, INC., and sets out the facts in the following paragraphs hereof:

1. This is an action for damages which exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00).

2. The Court has jurisdiction over this matter pursuant to 46 U.S.C.A. Section 688, and general maritime law.

3. The Defendant is a foreign corporation authorized to do and is doing business in the State of Florida. The

Defendant Corporation has a business office located in Miami, Dade County, Florida. The Plaintiff, AMELIA FLOHR HEYL, is the Personal Representative of the Estate of NANCY ZIMMERMAN, deceased, and the Plaintiff, AMELIA FLOHR HEYL, is the guardian of the natural children of NANCY ZIMMERMAN, KIM ANN ZIMMERMAN, age 15, and LISA MARIE ZIMMERMAN, age 10, minors.

4. This is an action for the wrongful death of Plaintiff's decedent, NANCY ZIMMERMAN.

5. At all times material hereto, the Defendant Corporation owned, operated, chartered, managed, maintained and/or controlled a passenger carrying cruise lines ship otherwise known as the SS Carnivale. Said ship was employed and navigated upon the navigable waters of the United States and the high seas.

6. On or about April 9, 1977, the Plaintiff's decedent was aboard the subject vessel as a fare paying passenger, a business invitee.

7. On or about April 9, 1977, the subject vessel sailed from its port at that time, Miami, Dade County, Florida.

8. During the course of the subject voyage Plaintiff's decedent was injured and/or became ill and was subsequently treated and cared for by the ship's physician. Said physician negligently and carelessly failed to properly diagnose that Plaintiff was suffering from severe shock post-hemorrhagic secondary to an intense internal hemorrhage due to two traumatic lacerations of the spleen with rupture of a possible subcapsular hematoma. As a direct and proximate result of said negligence and carelessness, the Plaintiff's decedent died.

9. The death of Plaintiff's decedent was the direct and proximate result of the carelessness and negligence of

the Defendant Corporation by and through its agents, servants and employees in the following ways:

A. The Defendant Corporation, by and through its agents, servants and employees, negligently and improperly hired or employed the subject ship's physician.

B. The subject vessel was unseaworthy under the circumstances in that it was not equipped to properly care for injured persons under similar circumstances such as the Plaintiff's decedent.

C. The Defendant Corporation by and through its agents, servants and employees negligently and carelessly failed to provide proper and adequate medical treatment and care for those persons injured and in similar positions as the Plaintiff's decedent.

D. The Defendant Corporation failed to afford appropriate and adequate equipment and personnel to properly and adequately diagnose and treat the Plaintiff's decedent.

F. The Defendant Corporation deviated from the norm in comparison with other companies similarly situated.

G. The Defendant Corporation was otherwise guilty of conduct which fell below the standard of care established by law for the protection of persons and property against an unreasonable risk of harm.

10. The Defendant Corporation owed a duty of care to the Plaintiff and breached that duty in the above described manners, thereby directly and proximately causing death to the Plaintiff resulting in damages.

11. The Plaintiff's decedent at all times acted in a reasonable and prudent manner in total regard for her own safety.

12. AMELIA FLOHR HEYL as Personal Representative of the Estate of NANCY ZIMMERMAN, deceased, sues the above-named Defendant for medical and/or funeral expenses and other charges that have become or will become a charge against the Estate of NANCY ZIMMERMAN, or that have been paid or will be paid on behalf of the decedent, NANCY ZIMMERMAN.

13. As a direct and proximate result of the negligence and carelessness of the Defendant, the decedent's minor children, KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, have lost the support, companionship, instruction, guidance, education and direction of their deceased mother, and in addition, they have in the past and will in the future endure great mental pain and suffering as the result of the loss of their parent.

WHEREFORE, premises considered, the Plaintiff, AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, demand judgment for damages in excess of TEN THOUSAND DOLLARS ($10,000.00) against the Defendant Corporation, CARNIVAL CRUISE LINES, INC., and further demand trial by jury on all issues in this action.

Cone, Owen, Wagner, Nugent, Johnson
& McKeown, P.A.
507 North Olive Avenue
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(305) 655-8100
Attorneys for Plaintiff

By /s/ John F. Romano
John F. Romano

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090 Civ-CF

AMELIA FLOHR HEYL, etc.,
Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

(Served January 24, 1979)

Plaintiff, by and through her undersigned attorneys, move this Court for leave to file amendment to Complaint substituting in effect the following in lieu of paragraphs 2, 3 and 4 of said Complaint:

"2. The Court has jurisdiction over this claim pursuant to 28 U.S.C.A. §1332, Diversity jurisdiction.

3. The defendant, CARNIVAL CRUISE LINES, INC., is a foreign corporation with principal place of business in Miami, Dade County, Florida. The plaintiff's decedent was a resident of Fort Worth, Turrant County, Texas where her estate is being probated through her personal representative, Amelia Flohr Heyl.

4. This is an action for the wrongful death of plaintiff's decedent, Nancy Zimmerman, and includes

claims brought by the estate for estate losses and for decedent's children, Kim Ann Zimmerman, age 15; and Lisa Marie Zimmerman, age 10, her survivors."

As grounds for the above, plaintiff states that the allegations in previous paragragh 2 were inadvertently made and the justice of the cause so requires the amendment of paragraphs 2, 3 and 4.

MEMORANDUM OF LAW

Said amendment is proper under Rule 15(a) and *Romero v Bethlehem Steel Corporation,* 515 F 2d 1249, U.S.C.A. 5th, 7/21/75.

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished by mail, to Christian D. Keedy, Esquire, of SMATHERS & THOMPSON, 1301 Alfred I. duPont Building, Miami, FL 33131, this 24th day of January, 1979.

Cone, Owen, Wagner, Nugent, Johnson
& McKeown, P.A.
507 North Olive Avenue
Post Office Box 3466
West Palm Beach, FL 33402
305/655-8100
Attorneys for Plaintiff
By /s/ Ward Wagner, Jr.
Ward Wagner, Jr.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090 Civ-CF

AMELIA FLOHR HEYL, etc.,
Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE

(Served January 24, 1979)

Plaintiff, by and through her undersigned attorneys, opposes Motion to Strike filed by defendant, CARNIVAL CRUISE LINES, INC., and as grounds therefor states that plaintiff has filed her Motion for Leave to File Amendment to Complaint restating paragraphs 2, 3 and 4 of said Complaint so that the jurisdiction of the Court is properly pled as diversity only under 28 U.S.C.A. §1332. Therefore, defendant's motion is improper upon granting of plaintiff's Motion for Leave to File Amendment to Complaint under Rule 15(a).

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, to Christian D. Keedy, Esquire, of SMATHER & THOMPSON, 1301 Alfred

I. duPont Building, Miami, FL 33131, this 24th day of January, 1979.

Cone, Owen, Wagner, Nugent, Johnson
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Attorneys for Plaintiff
By /s/ Ward Wagner, Jr.
Ward Wagner, Jr.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 78-8090-Civ-CF

AMELIA FLOHR HEYL, as Respresentative of the Estate of Nancy Zimmerman,
Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER

(Filed February 8, 1979)

Three motions are before the Court. Plaintiff seeks to amend her complaint. Defendant has moved to strike plaintiff's demand for a jury trial and to compel production of documents.

In her complaint, plaintiff described the action as one under the general maritime law for death proximately resulting from negligence on the part of the ship's doctor while the deceased was a passenger aboard the ship at sea. The plaintiff now seeks to amend her complaint so as to base jurisdiction on diversity of citizenship and to delete the allegations of the complaint which demonstrate maritime jurisdiction. Plaintiff relies on *Romero v. Bethlehem Steel Corporation*, 515 F.2d 1249 (5th Cir. 1975). Reliance on *Romero* is misplaced. *Romero* involved a claim for personal injury whereas the instant cause involves a claim for death resulting from negligence committed at sea. Plaintiff's exclusive remedy is under the Death on The High Seas Act, 46 U.S.C., §§ 761-768. A suit for death on the high seas must be brought in admiralty, 46 U.S.C., § 761,

and cases decided thereunder. *See Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968); *Higa v. Transocean Airlines*, 230 F.2d 780 (9th Cir. 1956); *Jennings v. Goodyear Aircraft Corp.*, 227 F.Supp. 246 (D.C. Del. 1964); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F.Supp. 447 (S.D. N.Y. 1964); and *First National Bank in Greenwich v. National Airlines*, 288 F.2d 621 (2nd Cir. 1961).

Because admiralty is the plaintiff's exclusive remedy, plaintiff's demand for a jury trial is improper. Inspection of the file discloses that plaintiff's motion to compel production should be granted.

For the reasons stated, it is

ORDERED and ADJUDGED as follows:

(1) Plaintiff's motion to amend her complaint in a manner to disclaim admiralty jurisdiction and to invoke diversity jurisdiction is denied.

(2) Defendant's motion to strike plaintiff's demand for jury trial is granted.

(3) Defendant's motion to compel production of documents is granted.

(4) This cause will be tried as previously set on April 3, 1979.

DONE and ORDERED at West Palm Beach, Florida, this 8th day of February, 1979.

/s/ Charles B. Fulton
Senior U. S. District Judge

cc: Smathers & Thompson
Cone, Owen, Wagner, Nugent, et al.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 79-8090-Civ-CF

AMELIA FLOHR HEYL, etc.,
Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER

(Filed March 23, 1979)

This cause is before the Court on plaintiff's motions to amend her complaint. Each motion is addressed *seriatim.*

PLAINTIFF'S RENEWED MOTION TO AMEND HER COMPLAINT

At the pre-trial conference in this cause, plaintiff orally renewed her motion to amend her complaint. An earlier motion by plaintiff to amend her complaint to bring this action under diversity jurisdiction and to try the case to a jury was denied by this Court on February 8, 1979. At the pre-trial conference, plaintiff's counsel renewed the motion to amend, however, this time seeking to bring the action under "general maritime law," and to try the cause to a jury.

Plaintiff's renewed motion to amend her complaint is, in effect, a renewed request for a trial by jury. Plaintiff has already plead general maritime jurisdiction, and the parties have stipulated that that is a basis for jurisdiction

in this cause. Under the doctrine of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), a federal remedy for wrongful death does exist under general maritime law. The question presently before the Court is whether plaintiff is entitled to a jury trial in an action for wrongful death brought under the general maritime law.

In 1920 Congress enacted the Death on the High Seas Act (DOHSA), 41 U.S.C. §761, *et seq.*, with the intent of creating a remedy for wrongful deaths more than three miles from shore. The Act did not address claims arising in territorial waters, and such claims were governed by state wrongful death statutes. This resulted in a lack of uniformity and a general uncertainty in the law, in that different substantive rules applied depending upon whether a claim arose in territorial waters or on the High Seas. In an effort to resolve this inconsistency, the Court in *Moragne* established a right of action under general maritime law when a wrongful death occurred in territorial waters. Subsequent decisions in this Circuit have extended the *Moragne* doctrine to wrongful death claims arising on the high seas as well as in territorial waters. *See Law v. Sea Drilling Corp.*, 523 F.2d 793 (5th Cir. 1975).

However, wrongful death claims brought under general maritime law have no greater rights than those under DOHSA. In *Green v. Rosa,* 481 F.2d 102 (5th Cir. 1973), the Court considered the question of plaintiff's right to a jury trial in a *Moragne* action and concluded that a jury trial was not available unless some independent jurisdictional base could be established. *Id* at 103. More recently, the Supreme Court employed a similar rationale in holding that no greater damages are available in a *Moragne* wrongful death claim than in a DOHSA claim, *Mobil Oil Corp. v. Higginbotham*, 98 S.Ct. 2010 (1978). The Court in *Higginbotham* concluded:

> In the area covered by the statute, [the DOHSA] it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

It is equally inappropriate to permit a jury trial in a *Moragne* claim, when one is not available in a DOHSA claim. Plaintiff's renewed motion to amend is therefore denied. The Court's Order of February 8, 1979 is, however, amended to delete the reference to the Death on the High Seas Act as the plaintiff's exclusive remedy. The remedy under DOHSA is co-extensive with the general maritime remedy afforded by *Moragne*. Neither avenue of relief affords plaintiff a jury trial.

PLAINTIFF'S MOTION TO AMEND COMPLAINT TO BRING A PENDANT CLAIM

At the pre-trial conference, plaintiff filed a motion seeking to amend her complaint to include a claim for the decedent's pain and suffering. Plaintiff relies on *Solomon v. Warren*, 540 F.2d 777, 792 (5th Cir. 1976) in support of her motion. In the *Solomon* case the claim for pain and suffering was brought under Florida Statute 46.021 as a pendant claim to plaintiff's claim under DOHSA. In the present case, as in *Solomon*, a claim for pain and suffering would have to be brought as a separate claim, invoking pendant jurisdiction. It is not simply an additional "element of damage" as plaintiff's memorandum suggests.

Defendant opposes plaintiff's motion on the grounds that the insertion of an additional claim, requiring additional discovery, would be prejudicial at this stage of the law suit.

The Court finds defendant's argument persuasive. The complaint in this cause was filed nearly one year ago. The case has been at issue for over seven months. A pre-trial stipulation has already been filed by the parties limiting the issues to those raised by the original complaint and answer. To add a pendant state law claim raising new issues and further discovery on the eve of trial would disrupt and delay the trial of this cause.

Accordingly, for the reasons set forth herein, it is

ORDERED and ADJUDGED that plaintiff's motions to amend her complaint are denied.

DONE and ORDERED at West Palm Beach, Florida, this 23 day of March, 1979.

/s/ Charles B. Fulton
Senior District Judge

cc: Cone, Owen, Wagner, et al.
Smathers & Thompson

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 78-8090-Civ-CF

AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, Minors.
Plaintiffs,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

MEMORANDUM OPINION

(Filed October 10, 1979)

This non-jury trial was conducted on April 4, 1979. The plaintiff's claim arises out of the death of her daughter, Nancy Zimmerman, while on a cruise on the TSS "Carnivale", a vessel operated by the defendant. The TSS "Carnivale" set sail from Miami on the evening of Saturday, April 9, 1977. Mrs. Zimmerman, her daughter Lisa, and her travelling companion, Ms. Janice Durrum, having travelled from Texas to Miami that day, were passengers on the "Carnivale". On Monday morning, April 11, 1977, Mrs. Zimmerman was found dead in her cabin. There is no dispute as to the immediate cause of death. Mrs. Zimmerman died from internal bleeding caused by a ruptured spleen.

The plaintiff claims that the death of Mrs. Zimmerman was a proximate result of the negligence of defendant, its officers and agents. Specifically, plaintiff alleges that the

ship's physician negligently failed to diagnose a ruptured spleen which caused her death. Plaintiff further alleges that the vessel was not properly equipped with a competent physician and proper facilities to diagnose and treat a patient suffering from internal bleeding from a ruptured spleen.

The defendant contends that all the facts and circumstances available to the ship's physician supported his diagnosis that Mrs. Zimmerman, like many other passengers then aboard the vessel, was suffering from motion sickness induced by the ship's reaction to a rough sea. The defendant urges that Mrs. Zimmerman was properly treated for that condition. The defendant denies that Mrs. Zimmerman evidenced signs and symptoms of a ruptured spleen and contends that any such symptomology, and the cause thereof, occurred after the ship's physician last attended Mrs. Zimmerman at one o'clock on Monday morning, April 11, 1977.

Although there is a conflict as to whether Mrs. Zimmerman was suffering from a ruptured spleen or from motion sickness while she was being seen by the ship's physician, there is no issue as to the time of her death. She died in her berth aboard the vessel sometime after two thirty o'clock on Monday morning, April 11, 1977. Whether the ship's doctor negligently failed to diagnose and deal with a ruptured spleen is the real issue in this cause.

There is no direct evidence of any trauma. Neither Mrs. Zimmerman's daughter nor Ms. Durrum saw Mrs. Zimmerman fall or otherwise sustain any injury, although one or both of them had been with her almost constantly since they departed Texas for Florida several days earlier. Mrs. Zimmerman did not mention any fall or other injury to her daughter, Ms. Durrum, the ship's nurse nor to the doctor. Evidence as to the time of the rupture of Mrs.

Zimmerman's spleen comes solely from the expert medical witnesses, primarily pathologists, in their attempt to partially reconstruct the scenario which ended in Mrs. Zimmerman's tragic death. They agree that Mrs. Zimmerman's spleen ruptured as a result of trauma but disagree as to when the traumatic rupture occurred.

When Mrs. Zimmerman was first seen and examined by the ship's physician, she was pale, her blood pressure was 80 over 60, and her pulse rate was 46. She was nauseated and mildly dehydrated, having vomited two or more times. She did not then or thereafter relate any history of trauma or injury. Examination of her body revealed no bruises. When palpated, there was tenderness in the upper abdominal quadrants. Her abdomen was otherwise soft and pliable. The evidence shows and the Court finds that those signs and symptoms are entirely indicative of and compatible with a diagnosis of motion sickness, especially when made aboard a vessel in a rough sea with many other passengers similarly complaining. Although some of those symptoms may indicate a rupture of a spleen, a low pulse rate is totally incompatible with internal bleeding. The expert medical witnesses all agree that a ruptured spleen produces an elevated pulse rate. It is uncontradicted that both the nurse and the doctor found an extremely low pulse rate and that after treatment, Mrs. Zimmerman's pulse, which was checked repeatedly, never rose above a low normal rate. The doctors who expressed the opinion that Mrs. Zimmerman was bleeding internally when she was seen by the ship's physician on Sunday, April 10, could only conjecture that the low pulse resulted from an "inaccurate reading." There is no evidence to disprove the low pulse rate found by both the nurse and the ship's physician other than the surmise of the doctors who testified for plaintiff.

The expert testimony is in conflict as to whether the treatment administered by Dr. Dreize was appropriate. Doctors for the plaintiff question the use of Adrenalin and Solumedrol. All of the physicians agree that intravenous fluids and Vistaril were appropriate treatment for motion sickness. While the use of Adrenalin may not have been appropriate, the physicians are in agreement that it did not harm Mrs. Zimmerman in any way. The evidence shows that after the Adrenalin was administered, her pulse promptly responded favorably.

Since it is not disputed that Mrs. Zimmerman died of internal bleeding from a ruptured spleen, the expert testimony establishing the time of trauma, or other event which caused the rupture, is crucial.[1] If an injury occurred after Mrs. Zimmerman was last seen by Dr. Dreize at 1:30 a.m., Monday morning, the defendant cannot be held responsible for her death. On that point the medical testimony is directly in conflict. The pathologist called by the defendant, Dr. Wright, testified that on the basis of his examination of tissue specimens of the decedent's diaphragm and retro-peritoneal fat the injury which caused Nancy Zimmerman's death occurred no more than four hours prior to her death. Dr. Wright reached this conclusion based on the absence of certain "vital reactions" in the hemorrhaged tissue. He testified that blunt trauma causes red blood cells to escape from broken blood vessels and that these red blood cells then irritate tissues triggering a repair process or "vital reactions." These reactions are medically known as red cell lysis, and are visible under microscopic examination of tissue, even after death. Dr. Wright testified that red cell lysis occurs anywhere from

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1. The medical experts agree that while trauma is by far the most likely cause of a spleen rupture, other internal factors, such as genetic defects and disease can cause a spontaneous rupture.

ten minutes to four hours from the time of trauma. Dr. Wright found no lysis in the tissue specimens of the decedent. The absence of lysis in the tissue specimens led Dr. Wright to the conclusion that the likely trauma which caused the ruptured spleen occurred no more than four hours prior to death, or, at the earliest, at 2 a.m. on Monday, April 11, 1977.

Dr. Fettah, the pathologist called by the plaintiff, does not disagree as to the time of Mrs. Zimmerman's death and the absence of the "vital reactions" known as red cell lysis. However, Dr. Fettah testified that red cell lysis will usually not occur until six or eight hours from the time of injury.[2] That would place the time of the injury sometime in the late evening on Sunday, April 10, 1977. Mrs. Zimmerman was with her traveling companion, Ms. Durrum, from the time Ms. Durrum returned from dinner that evening, and there is no evidence of any trauma or injury occurring during that time. Nor does the evidence suggest any sudden worsening condition on the evening of April 10, 1977, which would indicate a sudden internal rupture of the spleen. To the contrary, her vital signs and condition generally was improved when she was last seen by the doctor.

Having considered all of the evidence in this cause, including the credibility of the witnesses, the weight of the evidence, and the reasonable inferences of fact which are supported and justified by the evidence, the Court makes the following further specific findings and conclusions:

---

2. Dr. Fettah initially testified that red cell lysis occurs within six to eight hours of injury. However, when recalled as a rebuttal witness, he testified that lysis usually does not occur until eight hours from the time of injury and sometimes up to twenty to thirty hours after injury. Dr. Fettah and Dr. Wright both testified that red cell lysis does not occur after death.

FINDINGS OF FACT

1. The defendant, Carnival Cruise Lines, Inc., operated the TSS "Carnivale" at all times material herein.

2. On Saturday, April 9, 1977, Nancy Zimmerman boarded the TSS "Carnivale" as a fare paying passenger, accompanied by her minor daughter, Lisa Zimmerman, and by a traveling companion, Janice Durrum, also fare paying passengers.

3. The voyage of the TSS "Carnivale" was a seven-day round-trip cruise from Miami, Florida, with scheduled stops in San Juan, Puerto Rico, St. Thomas and St. Maarten. Mrs. Zimmerman, her daughter Lisa, and Ms. Durrum shared a cabin. During the early evening of Saturday, April 7, 1977, they familiarized themselves with the vessel, ate dinner during the first seating, and attended several functions on board the vessel. Mrs. Zimmerman had a normal evening of eating and drinking. She had steak for dinner, some wine with dinner, a drink at a "rum swizzle" party, and several drinks while playing bingo later in the evening. Mrs. Zimmerman and Ms. Durrum retired to their cabin between eleven o'clock and midnight and went to sleep.

4. On the morning of Easter Sunday, April 10, 1977, Mrs. Zimmerman and Ms. Durrum arose around 7 a.m. They hid some candy Easter eggs around the cabin for Lisa. They showered and dressed. After Lisa found her Easter candies, they all went to breakfast at the second seating.

5. On Sunday morning, April 10, 1977, the TSS Carnivale was passing through rough waters, and the ship was rocking considerably.

6. On Sunday morning, April 10, 1977, as Mrs. Zimmerman, Lisa and Ms. Durrum were on their way to

breakfast, Mrs. Zimmerman felt nauseous and stopped at the Purser's Office for Dramamine, an oral medication for motion sickness.

7. Shortly after she stopped at the Purser's office, Mrs. Zimmerman passed several places on the ship where other passengers had vomited. Mrs. Zimmerman also vomited.

8. At the breakfast table Mrs. Zimmerman felt sick again and wretched. Immediately thereafter, she went to the upper deck for some fresh air and later returned to her cabin, where her nausea continued.

9. At the request of Mrs. Zimmerman, Ms. Durrum went to the ship's clinic for medical assistance, where she found a dozen or more people reporting cases of motion sickness.

10. Ms. Durrum requested assistance. The ship's physician and nurse arrived at Mrs. Zimmerman's cabin very shortly thereafter, at approximately noon on Easter Sunday, April 10, 1977.

11. During the initial visit with Mrs. Zimmerman, the doctor conducted a physical examination, which included checking her pulse, blood pressure, heart and lung sounds, examining her eyes, palpating the abdomen, and questioning Nancy Zimmerman as to her medical history.

12. At the time of the examination Mrs. Zimmerman gave no history of trauma or injury.

13. When examined at twelve o'clock noon on Sunday, April 10, 1977, Mrs. Zimmerman was pale, her blood pressure was 80 over 60, her pulse was 46 and she was mildly dehydrated.

14. At that time she was experiencing some tenderness in the upper abdominal quadrants; however, physical

examination revealed no bruises or signs of trauma. Such tenderness is often present during nausea from seasickness.

15. The greater weight of the evidence indicates that Mrs. Zimmerman was then suffering from severe motion sickness, and that her dehydration was caused by vomiting and lack of fluid intake.

16. Upon completion of the physical examination of Mrs. Zimmerman, she was given an injection of dextrose (a fifty percent dextrose intravenous solution), eighty milligrams of Solumedrol, fifty milligrams of Vistaril and a small amount of Adrenalin.

17. Mrs. Zimmerman responded satisfactorily to that treatment. Her blood pressure rose to 120 over 70 and her pulse increased to 68. She did continue to experience nausea.

18. During the afternoon and evening of Sunday, April 10, 1977, the doctor and nurse continued to monitor Mrs. Zimmerman. During that time her condition improved, her vital signs remained within normal limits. Injection of the intravenous solution was terminated between 6 and 7 p.m. that evening. She continued to complain of nausea and was given Tigan, which is an approved medication for nausea.

19. During the afternoon and evening of Sunday, April 10, 1977, the seas continued rough and Mrs. Zimmerman's nausea continued.

20. At the time of the doctor's last visit, at approximately 1 a.m. on Monday, April 11, 1977, he again checked her vital signs, which were within normal limits. Both Mrs. Zimmerman and Ms. Durrum requested and were given a mild sedative to help them sleep.

21. Mrs. Zimmerman and Ms. Durrum remained awake and conversed until approximately 2:30 a.m. that morning, April 11, 1977.

22. Ms. Durrum was awakened by the cabin steward at approximately 11 a.m. on Monday, April 11, 1977, at which time Mrs. Zimmerman's body was cold and she appeared to be dead. The physician was immediately summoned. Upon inspection of the body, he pronounced Mrs. Zimmerman dead.

23. Immediately thereafter, a complete examination was conducted by the ship's physician, the ship's Captain, the Chief Purser and Nurse Rubins. Inspection of her body revealed no bruises or other evidence of trauma. The muscles of the body were stiffened but the body was not rigid.

24. At approximately 11:20 p.m., April 11, 1977, her body was removed from the vessel at San Juan, Puerto Rico, where an autopsy was conducted by Dr. Rafael Criado at the University of Puerto Rico Institute for Legal Medicine. The autopsy report, dated April 25, 1977, states that Mrs. Zimmerman died of internal hemmorrhaging due to a traumatically induced rupture of the spleen. Unfortunately and surprisingly, the ruptured spleen was not preserved by Dr. Criado. He did preserve other parts of her body in a bottle of formaldehyde. The contents of the bottle, along with the deposition of Dr. Criado, certain photographs which he took and a diagram which he prepared, are all in evidence.

25. The Court finds the testimony of Dr. Wright is more persuasive and reliable than the testimony of Dr. Fettah on the issue of when Mrs. Zimmerman's spleen ruptured.

26. The greater weight of the evidence does not prove that the injury, or other event causing Nancy Zimmerman's spleen to rupture, occurred prior to 2:30 a.m. on the morning of April 11, 1977.

27. The greater weight of the evidence does not show that Mrs. Zimmerman was suffering from a ruptured spleen while she was under the care and treatment of the ship's physician.

28. The plaintiff has not proved that negligence on the part of the defendant in the hiring of the ship's physician was a proximate cause of Mrs. Zimmerman's death.

29. There is no evidence that the defendant was negligent in failing to remove Mrs. Zimmerman from the vessel by helicopter or other means.

30. The plaintiff has not proved that the ship's physician was guilty of negligence which proximately caused the death of Mrs. Zimmerman.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to and the subject matter of this cause pursuant to 28 U.S.C. §1335 and general maritime law. *See Moragne v. States Marine Lines*, 398 U.S. 375 (1970).

2. The plaintiff has failed to prove, by the greater weight of the evidence, that the defendant, its officers or agents were guilty of negligence which caused the death of Mrs. Zimmerman.

3. The defendant is entitled to judgment, with its costs to be subsequently taxed by the Clerk.

ENTERED at West Palm Beach, Florida, this 17 day of September, 1977.

/s/ Charles B. Fulton
Senior District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090-Civ-CF

AMELIA FLOHR HEYL, as Personal Representatives of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIA ZIMMERMAN, minors,
Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

MOTION FOR NEW TRIAL

(Served October 17, 1979)

COMES NOW the Plaintiff, AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, minors, by and through her undersigned attorneys, and files this Motion for New Trial setting forth as grounds the following:

1. The Court erred in granting Defendant's Motion to Strike Plaintiff's Demand for Jury Trial when the case had already been set down for trial by jury. The Court erred in its Order dated February 8, 1979 in that said Motion to Strike should have been denied.

2. The Court erred in denying Plaintiff's Motion to Amend her Complaint when the Court denied said Motion on February 8, 1979 in its Order.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL

STATEMENT OF FACTS

Plaintiff filed its original Complaint in this case on March 30, 1978. The case is brought on behalf of the Estate of NANCY ZIMMERMAN, Deceased, and for her surviving minor children, LISA MARIE ZIMMERMAN and KIM ANN ZIMMERMAN. Paragraph 2 of the original Complaint states that the case is brought pursuant to general maritime law. Plaintiff's Complaint requests trial by jury.

The Order for Pretrial Conference, Calendar Call and Notice of Trial, which was filed on December 29, 1978, specifically provided that the case was being set for "jury trial" to be tried in West Palm Beach, Florida, on April 3, 1979.

On January 11, 1979, the Defendant filed a Motion to Strike requesting an Order from the Court striking Plaintiff's Demand for Jury Trial and requesting that the Court amend its Order for Pretrial Conference, Calendar Call and Notice of Trial so that the case would be scheduled for a non-jury trial rather than a jury trial.

On January 24, 1979, Plaintiff filed a memorandum with the Court opposing the Motion to Strike the jury trial which had been filed by Defendant and as grounds noted that the Plaintiff had filed its Motion for Leave to File an Amendment to the Complaint restating paragraphs 2, 3 and 4 of the Complaint so that jurisdiction of the Court is properly pled as diversity only under 28 USCA §1332. Plaintiff noted that Defendant's Motion to Strike was therefore improper upon the granting of Plaintiff's Motion for Leave to File Amendment to the Complaint under Rule 15(a).

Also on the 24th day of January, 1979, the Plaintiff filed its Motion for Leave to File an Amendment tc the Complaint. The amendment was in the form of a substitution of paragraphs 2, 3 and 4 of the initial Complaint and properly stated that the Court had jurisdiction over the claim pursuant to 28 USCA §1332, Diversity Jurisdiction. The requested amendment went on to specifically show actual diversity by virtue of Plaintiffs and Defendant being of states of a different residence. Plaintiff's Motion for Leave to File the Amendment to the Complaint also noted that the allegations as set forth in the initial paragraph 2 of the original Complaint were inadvertently made and Plaintiff stated that justice of the cause so requires the amendments of paragraphs 2, 3 and 4. A simple reading of the original paragraph 2 shows that the initial allegations were obviously made inadvertently.

On January 31, 1979, the Defendant filed its Memorandum of Law in Oppostiion to Plaintiff's Motion for Leave to File an Amendment to the Complaint.

The Court entered its Order, which was filed on February 8, 1979, and denied Plaintiff's Motion for Leave to File an Amendment to the Complaint and granted the Defendant's Motion to Strike Plaintiff's demand for trial by jury. In its Order, the Court relied primarily on *Romero v. Bethlehem Steel Corporation,* 515 F.2d 1249 (5th Cir. 1975).

The Court erred in granting Defendant's Motion to Strike. The Court erred in denying Plaintiff's Motion for Leave to File an Amendment to the Complaint.

DISCUSSION OF FACTS AND LAW

In accordance with Rule 15 of the Federal Rules of Civil Procedure, a party may amend its pleading only by leave of Court and leave shall be freely given when justice so requires. Obviously, in this instance, leave was not freely given even though justice did require it.

It is a general rule that amendments to pleadings are favored and should be liberally allowed in the furtherance of justice in order that every case may so far as possible be determined on its real facts and in order to speed the trial of causes. It is important to note that in the case at hand the setting of this case for trial by jury based upon a granting of Plaintiff's Motion for Leave to Amend would not have delayed the case one day. In fact, the case had already been set for trial by jury. 61 Am. Jur.2d, Pleadings, §310.

It is the usual practice of the Court to allow rather than refuse amendments and liberally to construe statutory provisions giving power to permit amendments on the furtherance of justice. Ibid.

It is a general principle that as long as a reasonable possibility exists that a defect can be cured by amendment, such right should be afforded. 61 Am. Jur.2d, Pleadings, §311. It is apparent in this instance that paragraph 2 of the initial Complaint was drafted the way it was through inadvertence. The defect could easily have been cured by an amendment and justice so required the amendment. An amendment to the pleading should be allowed at any stage of the proceeding where it will not delay the suit nor affect the rights of the adverse party and with the facts stated in the original and amended pleadings are substantially identical. The amendment herein would have caused absolutely no delay in the suit and certainly would not

have adversely affected the rights of the adverse party. And obviously, the factual allegations would not have been altered in any way. 61 Am. Jur.2d, Pleadings, §311.

Amendments may be made which change the technical form of the action, provided the pleading adheres to the transaction or matter originally pleaded. *Matarese v. Moore-McCormack Line,* 158 F.2d 631 (2nd Cir. 1946); 61 Am. Jur.2d, Pleadings, §323; *Holbrook v. Girand,* 80 P.2d 695 (Ariz. 1938); *Mount Vernon Preservation Society v. Clements,* 415 F. Supp. 141 (Dist. Ct. New Hampshire 1976).

In *Hageman v. Signal LP Gas, Inc.,* 486 F.2d 479 (6th Cir. 1973), a wrongful death action involving a gas explosion, the plaintiff was allowed to amend its Complaint to include an allegation of additional damages for 5 1/2 hours of conscious pain and suffering. The Circuit Court held that the amendment was properly permitted by the District Court. The original Complaint alleged that decedent's death resulted from a failure to adequately odorize the gas and to warn decedent of the proper safety precautions to be taken with respect to the gas. The amended Complaint alleged additionally that the violation of state and federal statute and the furnishing of gas for a defective hot water heater caused decedent's death and pain and suffering prior to death. The claims in the Amended Complaint arose out of the same occurrence set forth in the original Complaint—the explosion which occurred in the decedent's basement.

In the *Hageman* case, the Court went on to state that there are several elements to be considered in determining whether to permit an amendment: (a) undue delay in filing, (b) lack of notice to opposing parties, (c) bad faith by the moving party, (d) repeated failure to cure deficiencies by previous amendments, (e) undue prejudice to the opposing party, and (f) futility of amendment.

There was in this instance no undue delay in filing the Motion for Leave to Amend the Complaint nor was there any repeated failure to cure the deficiency by previous amendment in that this was the first Motion for Leave to Amend the Complaint filed by the Plaintiff and it was filed at a time when the case had already been set down for trial by jury. As previously explained, the reason for the amendment was due to inadvertence in the filing of the initial Complaint. The Motion was filed in good faith by the Plaintiff and the Defendant was most assuredly given sufficient notice. Moreover, there is absolutely no prejudice to the Defendant in permitting the amendment under these circumstances. See *Foman v. Davis,* 371 U.S. 178, 83 Sup. Ct. 227, 9 L.Ed.2d 222 (1962). Delay by itself is not sufficient reason to deny a Motion to Amend. *Middle Atlantic Utilities Company v. SMW Development Corporation,* 392 F.2d 380 (2nd Cir. 1968). Notice of substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted. *Williams v. United States,* 405 F.2d 234 (5th Cir. 1968).

The primary area in which courts have spoken when considering whether to permit an amendment is substantial prejudice. *Hageman v. Signal LP Gas, Inc.,* 486 F.2d 479 at 484 (6th Cir. 1973). There is no prejudice here.

In short, we are left with the issue of whether or not the amendment would be futile. And due to the fact that the proposed Amended Complaint, particularly paragraph 3, properly alleges the varying jurisdictional residency of the Plaintiff and Defendant, the case properly sounds in diversity of jurisdiction. The issue may thus be framed as follows:

DOES THE UNITED STATES DISTRICT COURT HAVE JURISDICTION OVER A CASE WHICH IS PLED PURSUANT TO 28 USCA §1332, DIVERSITY JURISDICTION, WHERE PLAINTIFF'S DECEDENT EXPIRED AT THE HANDS OF THE DEFENDANT ON THE HIGH SEAS?

The issue must be answered in the affirmative.

In accordance with 46 USCA §761, the Death on the High Seas Act:

> "WHENEVER THE DEATH OF A PERSON SHALL BE CAUSED BY THE WRONGFUL ACT, NEGLECT, OR DEFAULT OCCURRING ON THE HIGH SEAS BEYOND A MARINE LEAGUE FROM THE SHORE OF ANY STATE, OR THE DISTRICT OF COLUMBIA, OR THE TERRITORIES OR DEPENDENCIES OF THE UNITED STATES, THE PERSONAL REPRESENTATIVE OF THE DECEDENT MAY MAINTAIN A SUIT FOR DAMAGES IN THE DISTRICT COURTS OF THE UNITED STATES, IN ADMIRALTY, FOR THE EXCLUSIVE BENEFIT OF THE DECEDENT'S WIFE, HUSBAND, PARENT, CHILD, OR DEPENDENT RELATIVE AGAINST THE VESSEL, PERSON, OR CORPORATION WHICH WOULD HAVE BEEN LIABLE IF DEATH HAD NOT ENSUED."

DOHSA is not the only or sole exclusive remedy in death cases occurring on the high seas.

In *Romero v. Bethlehem Steel Corporation,* 515 F.2d 1249 (5th Cir. 1975), the Court held that in a civil suit cognizable in admiralty and also having some independent jurisdictional base, the plaintiff is entitled to trial by jury in accordance with the principles governing civil actions. It should be noted that the *Romero* case dealt with a personal injury as opposed to a death. It should also be noted

that in the *Romero* case the Court apparently held that plaintiff's claim had been made in accordance with Rule 9(h) and therefore the existence of diversity of citizenship as an alternative basis of jurisdiction would not entitle the plaintiff to a jury trial. In this case, however, Plaintiff made it clear that its amendment would base the claim solely on diversity of citizenship jurisdiction and certainly not in accordance with maritime law or Rule 9(h).

In *Harrison v. Flota Mercante Grancolombiana,* 577 F.2d 968 (5th Cir. 1978), an injured longshoreman sued a vessel owner, who in turn impleaded a stevedore, who along with the owner sought indemnity from the shipper. Plaintiff sued the owner of the vessel alleging negligence and unseaworthiness and designated the action as being one "within the admiralty jurisdiction of this Honorable Court as that term is defined by §9(h), Federal Rules of Civil Procedure." The owner impleaded defendant Flanigan stevedore's, the plaintiff's employer, alleging that the unseaworthiness of the vessel, if any, was due to the employer's negligence. The employer in turn filed a fourth party complaint against Rohm and Haas Company, the shipper of the defective product seeking indemnification based upon product liability and negligent failure to warn of the dangerous propensities of the product. Rohm and Haas demanded tiral by jury and that demand was denied by the trial court. The Fifth Circuit conceded that the case was one which fell within the confines of admiralty jurisdiction as well as diversity jurisdiction and stated that, "Since the right to trial by jury is a right of constitutional dimension, we shall closely scrutinize the jury trial demand." The Court noted, in following its decision in the *Romero* case, that the pleader, in this case meaning the Plaintiff, may claim the special benefits of admiralty procedures and remedies, including a non-jury trial. However, in the *Harrison* case, it was a "defendant"

who was claiming trial by jury. The Court went on to hold that a tort action cognizable in admiralty may also be brought, assuming the existence of some independent jurisdictional base like diversity of citizenship, as a civil suit. The Court in *Harrison* denied the demand for trial by jury on the sole basis that plaintiff elected to utilize admiralty jurisdiction and therefore this defendant was stuck with it. Even though the case was one which "sounded in admiralty," had the plaintiff elected to file its Complaint using diversity of citizenship as the basis of jurisdiction, then this defendant would have been permitted trial by jury. See *Fitzgerald v. United States Lines Company,* 374 U.S. 16, 83 Sup. Ct. 1646, 10 L.Ed.2d 720 (1963).

In *Oroco Marine, Inc. v. National Marine Service, Inc.,* 71 FRD 220 (So. Dist. Tex. 1976), an action was brought on a maritime contract for delivery of diesel engines and the defendant asserted a third party claim against the supplier of the engines. On demand of the third party defendant for trial by jury, the District Court held that the absence of an admiralty designation under the rule in the third party complaint together with the presence of diversity of citizenship jurisdiction over the third party claim, mandated that the third party defendant's jury request be granted. The logic is similar to the case at hand, although it should be noted that the *Oroco* decision was rejected by the *Harrison* decision.

It should also be noted that in *Fawcett v. Pacific Far East Lines, Inc.*, 76 FRD 519 (No. Dist. Cal. 1977), wherein the widow of a deceased crew member brought an action against the vessel owner, which was followed by a third party complaint filed by the vessel owner against the medical center, which was alleged to have been negligent in certifying the deceased crew member as physically

qualified to commence the voyage on which he died, the Court held, on the medical center's Motion for Trial by Jury, that the claim of the vessel owner was cognizable in admiralty and also by the federal court as being ancillary to the widow's claim against the vessel owner so that, since the claim was not identified as being a maritime claim and was not cognizable only in admiralty, the medical center was in fact entitled to trial by jury. See Norris, "The Law of Maritime Personal Injuries 3rd," Section 127 (1979 Supp.)

"It is familiar law that the party who brings a suit is master to decide what law he will rely upon." The *Fair v. Kohler Die and Spec. Company,* 228 U.S. 22, 33 Sup. Ct. 410, 57 L.Ed. 716 (1913); *Lowe v. Trans World Airlines, Inc.,* 396 F. Supp. 9 (So. Dist. N.Y. 1975). In the *Lowe* case, plaintiffs who sued to recover for the death of passengers in an airplane which crashed at sea following the claimed explosion of a time bomb allegedly planted at an airport, but who deliberately and carefully chose not to rest upon DOHSA were not required to have their case within DOHSA and sue only in federal court. Hence, the case was remanded, even though the defendants claimed exclusive federal jurisdiction. The important point of the csae being that, even though plaintiffs' decedents were killed on the high seas, the Court held that the Death on the High Seas Act was not the sole, exclusive and only remedy for the plaintiffs due to the fact that the plaintiffs were masters to decide what law they would rely upon. The case at bar fits squarely within the confines of the *Lowe* decision.

See also *Thompson v. Offshore Company,* 440 F. Supp. 752 (So. Dist. Tex.).

In view of the foregoing, this litigation fits within the statutory language of 28 USCA §1332, Diversity of Citizen-

ship. The Court erred in denying Plaintiff's Motion for Leave to Amend and the Court erred in denying Plaintiff's request for trial by jury.

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Attorneys for Plaintiff
By /s/ John F. Romano
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing has been furnished, by mail, this 17th day of October, 1979, to CHRISTIAN D. KEEDY, ESQUIRE, Smathers & Thompson, 1124 A. I. DuPont Building, Miami, Florida 33131.

By /s/ John F. Romano
John F. Romano

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 78-8090-Civ-CF

AMELIA FLOHR HEYL, as Personal Representative of the Estate of Nancy Zimmerman, Deceased, etc.,
Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER

(Filed November 6, 1979)

This cause is before the Court on plaintiff's motion for new trial. Plaintiff argues that a new trial is warranted on the grounds that (1) The Court erred in striking plaintiff's demand for a jury trial; and (2) that the Court erred in denying plaintiff's motion to amend her complaint. The Court concludes that plaintiff's motion for new trial is without merit.

On January 11, 1979, the defendant in this cause moved to strike plaintiff's demand for a jury trial. Plaintiff's complaint alleged several grounds for jurisdiction. The only properly pled basis for jurisdiction was general maritime law. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). On January 24, 1979, plaintiff moved to amend the complaint to assert diversity jurisdiction as an additional jurisdictional base. Plaintiff proposed to substitute the following jurisdictional language:

> "2. The Court has jurisdiction over this claim pursuant to 28 U.S.C.A. §1332, Diversity Jurisdiction.

3. The defendant, Carnival Cruise Lines, Inc. is a foreign corporation with principal place of business in Miami, Dade County, Florida. The plaintiff's decedent was a resident of Fort Worth, Turrant County, Texas, where her estate is being probated through her personal representative, Amelia Flohr Heyl.

4. This is an action for the wrongful death of plaintiff's decedent, Nancy Zimmerman, and includes claims brought by the estate for estate losses and for decedent's children, Kim Ann Zimmerman, age 15; and Lisa Marie Zimmerman, age 10, her survivors."

Allegations of residency are not sufficient to establish diversity jurisdiction. *Delome v. Union Barge Line Company,* 444 F.2d 225, 233 (5th Cir. 1971). Yet even assuming that diversity jurisdiction was correctly pled, the motion to amend was properly denied.

Plaintiff sought recovery for an alleged wrongful death on the high seas. This Court concluded in its Order of February 8, 1979, and again in its subsequent Order of March 23, 1979, that plaintiff's remedy was exclusively in Admiralty. The Death on the High Seas Act (DOHSA) is the exclusive remedy for death caused by a wrongful act more than a marine league from shore, 46 U.S.C. §761. That principle has been reaffirmed by the Supreme Court in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 614 (1978). *See* also, *Renner v. Rockwell International Corp.,* 587 F.2d 1030, 1031 (9th Cir. 1978). Moreover, the Court's ruling in *Higginbotham* makes clear that any general maritime rights conferred by *Moragne* must be limited by DOHSA.

Plaintiff relies on *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975) in support of her contention that the DOHSA is not the exclusive basis for her claim. Yet, that case involved personal injury, not death, and is simply inapplicable.

As to plaintiff's demand for a jury trial, it is settled law that plaintiff is not entitled to a jury trial in Admiralty. *Green v. Ross*, 481 F.2d 102 (5th Cir. 1973).

For the reasons set forth herein, it is

ORDERED and ADJUDGED that plaintiff's motion for new trial is denied.

DONE and ORDERED at West Palm Beach, Florida, this 6 day of November, 1979.

/s/ Charles B. Fulton
Senior District Judge

cc: Smathers & Thompson
Cone, Owen, Wagner, et al.

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090-Civ-CF

AMELIA FLOHR HYEL, As Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, Minors,
Plaintiffs,

v.

CARNIVAL CRUISE LINES, Inc.,
Defendant.

JUDGMENT

(Filed November 6, 1979)

THIS CAUSE came on for trial before the Court, Honorable Charles B. Fulton, United States District Judge, presiding, and the issues having been duly tried and decision having been duly rendered, it is

ORDERED AND ADJUDGED that the Plaintiff, AMELIA FLOHR HEYL, As Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, Minors, recover nothing from the Defendant, that the action be dismissed on the merits, and that the Defendant recover its costs herein from the Plaintiff, which shall be hereinafter taxed.

DONE AND ORDERED in Chambers at the United States District Courthouse, West Palm Beach, Palm Beach County, Florida, this 6 day of Nov. 1979.

/s/ Charles B. Fulton
United States District Judge

Copies furnished to:
Christian D. Keedy, Esq.
Ward Wagner, Esq.

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 78-8090 CIV. CF

AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, etc.,
Plaintiff/Appellant,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant/Appellee.

NOTICE OF APPEAL

(Filed December 3, 1979)

Notice is hereby given that AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit, from the Order Denying Plaintiff's Motion for New Trial entered in this action on the 6th day of November, 1979, from the Final Judgment entered in this action on the 6th day of November, 1979, and from the Memorandum Opinion entered in this action on the 10th day of October, 1979.

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By /s/ Richard A. Kupfer
Richard A. Kupfer

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3957
Summary Calendar*

AMEDIA FLOHR HEYL, As Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, Minors,
Plaintiff-Appellant,

versus

CARNIVAL CRUISE LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(August 20, 1980)

Before TJOFLAT, FRANK M. JOHNSON, JR. and GARZA, Circuit Jurges.

PER CURIAM:

On April 9, 1977, Nancy Zimmerman, age 42, boarded the Appellee's luxury cruiseliner, the TSS Carnivale. She was a farepaying passenger taking a pleasure cruise out of the Port of Miami. Mrs. Zimmerman became ill, and was

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*Fed. R. App. P. 34(a); 5th Cir. R. 18.

examined and treated by the ship's physician. On April 11, she was discovered dead in her cabin. The Carnivale was on the high seas.

This suit was filed by Amelia Flohr Heyl as Admintratrix of Mrs. Zimmerman's estate and guardian of her two daughters. In the original complaint, Plaintiff alleged the Death on the High Seas Act [DOHSA], 46 U.S.C. §761 et seq., and the General Maritime Law as bases of federal jurisdiction. A jury trial was requested. In its answer, Defendant Carnival denied the allegations of jurisdiction except as they pertained to admiralty and maritime jurisdiction.

Plaintiff subsequently filed a motion seeking leave to amend the complaint to substitute diversity as the basis of federal jurisdiction. The Defendant opposed the motion and the District Court ruled that Plaintiff's exclusive remedy was under DOHSA, thus being in admiralty and a nonjury matter. Leave to amend was denied.

Pursuant to a pretrial order, the parties' counsel jointly prepared and filed a pretrial stipulation. The Plaintiff and Defendant stipulated admiralty as the basis of federal jurisdiction, and DOHSA as the controlling law.

After a bench trial, the district found for the Defendant, stating that Plaintiff had failed to prove that the Defendant or its agents were guilty of negligence which caused the death of the Plaintiff's decedent.

Plaintiff filed a motion for a new trial, solely on the basis of the District Court's denial of the motion to amend to allege diversity jurisdiction. The motion for new trial was denied, and Plaintiff appeals. We affirm.

In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the Supreme Court held that DOHSA provides the

exclusive remedy for death on the high seas. *See also Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71, 75 (5 Cir. 1980). The District Court did not err in overruling the motion for leave to amend. Since this was, accordingly, a DOHSA case, it was properly tried in admiralty without a jury. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, n. 28 (1959).

AFFIRMED.

Supreme Court, U.S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1980
NO. 80-565

AMELIA FLOHR HEYL, As
Personal Representative of the Estate
of Nancy Zimmerman, Deceased, and As
Guardian of Kim Ann Zimmerman and
Lisa Marie Zimmerman, Minors,

Petitioner/Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,

Respondent/Defendant.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November, 1980

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REASONS FOR DENYING THE WRIT

I.

DIVERSITY OF CITIZENSHIP BETWEEN THE PETITIONER AND RESPONDENT HAS NEVER BEEN ESTABLISHED IN THIS CASE, SO THERE IS NO PROPER RECORD FOR A DETERMINATION BY THIS COURT OF THE ISSUE OF WHETHER THE PETITIONER COULD HAVE BROUGHT THE SUIT IN DIVERSITY RATHER THAN IN ADMIRALTY.

II.

PETITIONER AND RESPONDENT FILED A PRETRIAL STIPULATION IN THE DISTRICT COURT JOINTLY STIPULATING ADMIRALTY AS THE BASIS OF FEDERAL JURISDICTION. THE PETITIONER THEREBY WAIVED THE ISSUE OF DIVERSITY JURISDICTION WHICH IS ACCORDINGLY INAPPROPRIATE SUBJECT MATTER FOR A PETITION FOR CERTIORARI TO THIS COURT.

III.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS FOLLOWS APPLICABLE DECISIONS OF THIS COURT, SO THERE IS NO CONFLICT BASIS FOR GRANTING THIS PETITION.

STATEMENT OF THE CASE

The Respondent recites a statement of the case because the Petitioner's statement of the case contains unnecessary detail and omits significant facts.

The Plaintiff/Petitioner in this suit is Amelia Flohr Heyl, personal representative of the estate and guardian of the minor daughters of the decedent, Nancy Zimmerman, a passenger who died aboard the cruise ship "CARNIVALE". The Defendant/Respondent is Carnival Cruise Lines, Inc., operator of the cruise ship line.

This suit arises from a cruise ship passenger's death which occurred on the high seas. It has been stipulated that the alleged negligent conduct occurred on the high seas. (R. 210). In the original Complaint the Petitioner alleged the Death on the High Seas Act, 46 U.S.C. §§ 761-768, and general maritime law as the basis of federal jurisdiction. 1/ The Petitioner subsequently filed a motion seeking leave to amend the Complaint to substitute diversity as the basis of federal jurisdiction (R. 79; A. 2). That motion was denied on grounds that the Petitioner's exclusive remedy was under the Death on the

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1/ The Complaint actually contained an incorrect reference to the Jones Act, 46 U.S.C. § 688 (R. 1), which was inappropriate because the Plaintiff's decedent was a passenger rather than a seaman, and the Plaintiff subsequently indicated that the intent had been to refer to the Death on the High Seas Act. (Petition, page 2).

High Seas Act, and suits under that Act must be brought in admiralty. (R. 90; A. 4).

The case was scheduled for trial, and pursuant to a pretrial order (R. 42-43), the parties' counsel jointly prepared and filed a pretrial stipulation (R. 210-225; A. 6-14). Therein, the Petitioner and the Respondent jointly stipulated admiralty as the basis for federal jurisdiction (R. 210; A. F) and the Death on the High Seas Act, 46 U.S.C. §§ 761-768, as the controlling law. (R. 210-215; A. 7, 12).

A trial was conducted before the district court sitting in admiralty. The court, by memorandum opinion dated September 17, 1979 (R. 442-449), found for the Respondent stating that the Petitioner had failed to prove, by the greater weight of the evidence, that the Respondent, its officers or agents, were guilty of negligence which caused the death of the Petitioner's decedent. (R. 449).

At no time during the proceedings before the district court was evidence of the citizenship of the Petitioner or of the Respondent placed on the record.

The Petitioner filed a motion for new trial solely on the basis of the trial court's denial of the motion to amend to allege diversity jurisdiction. (R. 450-458). The motion for new trial was denied (Supplemental Record on Appeal), and the Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The Petitioner framed the single issue on appeal as follows:

> Whether the lower court erred in striking Plaintiff's demand for trial by jury and denying Plaintiff's motion to amend

its complaint to allege diversity of citizenship as the sole basis of federal jurisdiction when no prejudice to Defendant was alleged by Defendant or found by the court and the sole basis for the denying of the amendment to the complaint was that it would be futile since Plaintiff would still not be entitled to a trial by jury?

The Fifth Circuit entered a per curiam affirmance on August 20, 1980 with a brief written opinion. (A. 15-17). The Fifth Circuit noted that the Petitioner and Respondent had stipulated admiralty as the basis of federal jurisdiction and the Death On The High Seas Act ("DOHSA") as the controlling law. (A. 16). The Fifth Circuit then cited this Court's holding in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) that DOHSA provides the exclusive remedy for a wrongful death on the high seas, and accordingly found that the district court did not err in overruling the Petitioner's motion for leave to amend to substitute diversity for admiralty jurisdiction. (A. 17). The Fifth Circuit stated that since it was a DOHSA case, it was properly tried in admiralty without a jury, citing Romero v. International Operating Co., 358 U.S. 354, 371, n. 28 (1959). (A. 17).

The Petitioner thereupon filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT SUPPORTING REASONS FOR DENYING WRIT

I.

DIVERSITY OF CITIZENSHIP BETWEEN THE PETITIONER AND RESPONDENT HAS NEVER BEEN ESTABLISHED IN THIS CASE, SO THERE IS NO PROPER RECORD FOR A DETERMINATION BY THIS COURT OF THE ISSUE OF WHETHER THE PETITIONER COULD HAVE BROUGHT THE SUIT IN DIVERSITY RATHER THAN IN ADMIRALTY.

Although the Petitioner has submitted several versions of the Question Presented to this Court, the essence of the Petitioner's inquiry is whether the Petitioner could have brought this suit in diversity rather than in admiralty. However, the Petitioner has never established on the record facts demonstrating that diversity actually exists in this case. No evidence concerning the citizenship of the Petitioner or of the Respondent appears in the record of this cause, except in unsupported statements made by Petitioner's counsel in its brief to the Fifth Circuit and in this Petition. (See Petition, page 2). No proffer of evidence of citizenship was made at trial or at any other time in the proceedings below to preserve this issue for appellate review.

Since diversity between the Petitioner and Respondent has not been established on the record, the Petitioner is asking this Court to address a hypothetical question, i.e. if diversity existed in this case, could the Petitioner's suit have been brought in diversity?

The Petitioner has cited as error the district court's denial of her motion to amend the Complaint to substitute diversity allegations. However, even had the proposed amendment been allowed, no diversity would have been established. The relevant portions of the Petitioner's proposed amendment to the Complaint were:

> 2. The Court has has jurisdiction over this claim pursuant to 28 U.S.C.A § 1332, Diversity jurisdiction.
>
> 3. The defendant, CARNIVAL CRUISE LINES, INC., is a foreign corporation with principal place of business in Miami, Dade County, Florida. The plaintiff's decedent was a resident of Fort Worth, Turrant County, Texas where her estate is being probated through her personal representative Amelia Flohr Heyl.

(R. 81, A. 2) (emphasis added). This attempt to allege diversity jurisdiction was prima facie deficient in two respects. Firstly, allegations of residency are not sufficient to establish diversity jurisdiction. Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir. 1971), cert. denied, 404 U.S. 995 (1971); Congress of Racial Equality v. Clemmons, 323 F.2d 54 (5th Cir. 1963). Secondly, for purposes of determining diversity in this case brought by the Petitioner as representative of an estate, it is the citizenship of the Petitioner, and not that of the Petitioner's decedent, which is relevant and which should have been established on the record. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931); Kerrigan's Estate v. Joseph E. Seagram & Sons, 199 F.2d 694 (3d Cir. 1952); Harris v. Johnson, 345 F. Supp. 516 (N.D. Miss. 1972); Lang v. Elm City Construction Co., 217 F. Supp. 873 (D. Conn. 1963), aff'd 324 F.2d 235 (2d Cir. 1963).

Again, the question which the Petitioner is presenting to this Court is whether the Petitioner could have brought her suit in diversity. Since the Petitioner has failed to present a record establishing that diversity does in fact exist, the Question Presented in the Petition could be resolved only by rendering an impermissible advisory opinion. It is submitted that consideration by this Court of the issue raised is not proper on the record presented for review, and this Petition should accordingly be denied.

II.

PETITIONER AND RESPONDENT FILED A PRETRIAL STIPULATION IN THE DISTRICT COURT JOINTLY STIPULATING ADMIRALTY AS THE BASIS OF FEDERAL JURISDICTION. THE PETITIONER THEREBY WAIVED THE ISSUE OF DIVERSITY JURISDICTION WHICH ACCORDINGLY IS INAPPROPRIATE SUBJECT MATTER FOR A PETITION FOR CERTIORARI TO THIS COURT.

After extended preparation for trial by both parties in this cause, including various motions directed to the pleadings and discovery, the case was set for trial. (R. 42). Approximately one month prior to the trial date, counsel for the parties met pursuant to order of the district court (R. 42-43) and prepared a joint pretrial stipulation setting out, inter alia, the basis of federal jurisdiction, issues of law as to which the parties were in agreement, and issues of law which remained for determination by the court. (R. 210-225; A. 6-14).

As to the basis of federal jurisdiction, the parties stipulated:

> A. 28 U.S.C. § 1333, Admiralty and maritime case;
>
> B. Rule 9(H) of the Federal Rules of Civil Procedure;
>
> C. 46 U.S.C. § 761, Death on the High Seas by Wrongful Act;
>
> D. Alleged tortious conduct occurred on the high seas;
>
> E. Suit in admiralty.

(R. 210; A. 7).

The parties further stipulated that they were in agreement as to the following issues of law:

> A. This action is brought pursuant to the Death on the High Seas Act, 46 U.S.C. §§ 761-768;
>
> B. The law applicable to damages is governed by 46 U.S.C. §§ 761-762;
>
> C. The law applicable to comparative negligence is governed by 46 U.S.C. § 766;
>
> D. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are applicable to this case;
>
> E. The doctrine of comparative negligence applies here.

(R. 215; A. 12). The parties stipulated that the only issues of law remaining for determination by the court were related to the applicability of the seaworthiness warranty doctrine and the liability of a shipowner for the negligence of the ship's physician. (R. 215; A. 12).

The joint pretrial stipulation was filed with the district court on March 8, 1979 (R. 210, A. 6) and counsel for the parties subsequently attended a pretrial conference before the court. (R. 261). 2/ Petitioner's counsel did not raise the issue of diversity in the pretrial stipulation. On the contrary, Petitioner's counsel stipulated that admiralty was the basis of federal jurisdiction and that the provisions of the Death on the High Seas Act would govern as to proof of facts on issues such as comparative negligence and measure of damages. The Petitioner did not at any time seek leave from the district court to amend or modify the pretrial stipulation.

The Petitioner sought in her appeal to the Fifth Circuit and now seeks in this Petition to raise an issue in direct conflict with the stipulations made in the pretrial stipulation; specifically, the issue of substituting diversity for admiralty as the basis of federal jurisdiction. Pretrial stipulations are absolutely binding, Laird v. Air Carrier Engine Service, Inc., 263 F.2d 948 (5th

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2/ The Petitioner made an oral motion at the pretrial conference seeking leave to amend the Complaint to bring the action under general maritime law. (R. 261; A. 18). The district court treated the motion as an attempt to obtain a jury trial (R. 261; A 18), and properly denied the motion as futile; where general maritime law is the sole basis of federal jurisdiction, the suit must be tried in admiralty without a jury. Green v. Ross, 481 F.2d 102 (5th Cir. 1973), cert. denied, 414 U.S. 1068 (1973). Furthermore, the Complaint had already alleged maritime law (R. 1), so the amendment would have been senseless as well as futile.

Cir. 1959), and absent modification, are not an appropriate issue for appeal. Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 95 (5th Cir. 1976). Pretrial stipulations supersede prior pleadings, City of Lakeland Florida v. Union Oil Co. of California, 352 F. Supp. 758 (M.D. Fla. 1973), and matters agreed to by the parties in a pretrial stipulation are waived in the trial court and may not be pursued on appeal. See New Orleans Furniture Manufacturing Co. v. Great American Insurance Co., 413 F.2d 1278 (5th Cir. 1969).

The pretrial stipulation filed with the district court in this case is absolutely binding on the Petitioner; it stands - unmodified - on the record. (R. 210-225; A. 6-14). Having stipulated admiralty as the basis of federal jurisdiction, the Petitioner waived the issue of whether her suit could have been brought in diversity. Since the issue has been waived by the Petitioner, it is inappropriate subject matter for exercise of this Court's certiorari jurisdiction.

III.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS FOLLOWS APPLICABLE DECISIONS OF THIS COURT, SO THERE IS NO CONFLICT BASIS FOR GRANTING THIS PETITION.

This is a suit for the death of a cruise ship passenger which occurred on the high seas. The parties to the suit stipulated that the alleged tortious conduct occurred on the high seas. (R. 210; A. 7). Under this Court's decision in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), the Death on the High Seas Act, 436

U.S.C. §§ 761-768 ("DOHSA") provides the exclusive remedy for wrongful deaths on the high seas. 3/ Suits under DOHSA are properly tried in admiralty without a jury. See Romero v. International Terminal Operating Co., 358 U.S. 354, 371, n. 28 (1959); see also Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958), cert. denied, 358 U.S. 838 (1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), cert. denied, 355 U.S. 907 (1957); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955), cert. dismissed, 352 U.S. 802 (1956); G. Gilmore & C. Black, The Law of Admiralty, 24 n. 79, 40 n. 133 (2d ed. 1975). 4/

3/ That is, DOHSA is the exclusive remedy for non-seamen. Seamen may also proceed under the Jones Act, 46 U.S.C. § 688. See, e.g. In re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974), cert. denied sub nom. Monk v. Chambers & Kennedy, 423 U.S. 886 (1975).

4/ The widespread acceptance of this principle is demonstrated by the numerous district court decisions so holding. See, e.g., Kropp v. Douglas Aircraft Company, 329 F. Supp. 447 (E.D.N.Y. 1971); Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968); Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683 (N.D. Ill. 1964); Ridgedell v. Olympic Towing Corporation, 205 F. Supp. 952 (E.D. La. 1962); Blumenthal v. United States, 189 F. Supp. 439 (E.D. Pa. 1960), aff'd, 306 F.2d 16 (3d Cir. 1962); Kunkel v. United States, 140 F. Supp. 591 (S.D. Cal. 1956); Cunningham v. Bethlehem Steel Company, 231 F. Supp. 934 (S.D.N.Y. 1964); Iafrate v. Compagnie Generale Transatlantique, 106 F. Supp. 619 (S.D.N.Y. 1952); Egan v. Donaldson Atlantic Line, Ltd., 37 F. Supp. 909 (S.D.N.Y. 1941).

The exclusivity of DOHSA as the remedy for wrongful deaths on the high seas was also discussed and reaffirmed by this Court in the recent case of American Export Lines, Inc. v. Alvez, ___ U.S. ___, 100 S.Ct. 1673 (1980). The decision of the Fifth Circuit is in accordance with this Court's holding in Higginbotham and discussion in Alvez. Accordingly, the Petitioner cannot demonstrate that the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court, or that the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. This Court's holding in Higginbotham is controlling, and it was followed by the Fifth Circuit.

Furthermore, the Petitioner has specifically stated that in this suit she was not seeking to invoke substantive remedies available under non-statutory general maritime law (Petition, page 8), i.e. the Petitioner was not seeking to invoke the remedy created by Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). It is therefore difficult to understand the thrust of the Petitioner's assertion that her suit could have been brought in diversity.

In order to bring a suit in diversity, a plaintiff must have a cause of action and seek a remedy which could have, and would have, been pursued in a state court but for the fact that diversity of citizenship exists between the parties. In this case, the Petitioner states that she does not seek to invoke the general maritime non-statutory remedy (Moragne); neither does the Petitioner invoke any state wrongful death remedy. Therefore, DOHSA is the only remedy available to the Petitioner as a matter of fact, as well as as a matter of law under Higginbotham.

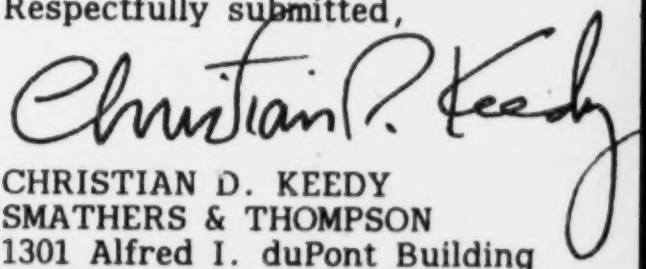
Since suits under DOHSA must be brought on the admiralty side of federal district court (see authorities cited on page 11, supra), the Petitioner had no cause of action or remedy to pursue in a state court, or on the civil side of federal court by reason of diversity.

The issues involved in the Question Presented have already been decided by this Court, and the Fifth Circuit's decision is in complete accord with this Court's rulings. The Petitioner has not and cannot set forth a reason for granting a writ of certiorari which meets the standards set out in 28 U.S.C. Rules of the Supreme Court, Rule 19.

CONCLUSION

The Petitioner has failed to present a proper record to this Court, has waived at the district court level the issue it now seeks to present, and has set forth no reason which meets the standards set forth in Rule 19 of the Rules of this Court for granting a review on writ of certiorari. The Respondent therefore respectfully prays that the Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

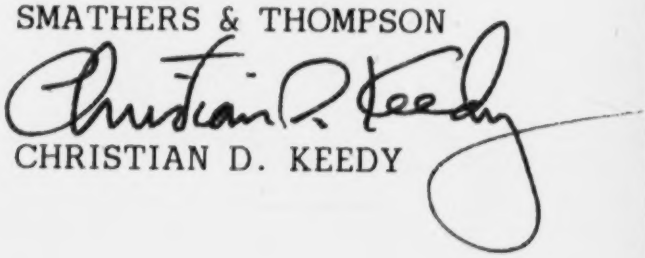


CHRISTIAN D. KEEDY
SMATHERS & THOMPSON
1301 Alfred I. duPont Building
169 East Flagler Street
Miami, Florida 33131
Telephone: (305) 379-6523

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served by First Class U.S. Mail on all parties required to be served, to-wit: A. WARD WAGNER and RICHARD A. KUPFER, CONE, OWEN, WAGNER, NUGENT, JOHNSON, HAZOURI & ROTH, P.A., Attorneys for Petitioner/Plaintiff, 507 North Olive Avenue, P. O. Box 3466, West Palm Beach, Florida 33402, this 6th day of November, 1980.

SMATHERS & THOMPSON



CHRISTIAN D. KEEDY

APPENDIX

APPENDIX OF RESPONDENT

Date Filed or Served	Instrument	
1/24/79	Plaintiff's Motion for Leave to File Amendment to Complaint	A2
2/8/79	Order on Plaintiff's Motion for Leave to File Amendment to Complaint, Defendant's Motion to Strike Plaintiff's Demand for Jury Trial, Defendant's Motion to Compel Production of Documents. .	A4
3/8/79	Pretrial Stipulation	A6
8/20/80	Decision of the United States Court of Appeals to the Fifth Circuit	A15
3/23/79	Order on Plaintiff's Renewed Motion to Amend Her Complaint and Plaintiff's Motion to Amend Complaint to Bring a Pendant Claim	A18

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090 Civ-CF

AMELIA FLOHR HEYL, etc.,
Plaintiff,

vs.

CARNIVAL CRUIST LINES, INC.,
Defendant.

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

(Served January 24, 1979)

Plaintiff, by and through her undersigned attorneys, move this Court for leave to file amendment to Complaint substituting in effect the following in lieu of paragraphs 2, 3 and 4 of said Complaint:

2. The Court has jurisdiction over this claim pursuant to 28 U.S.C.A. § 1332, Diversity jurisdiction.

3. The defendant, CARNIVAL CRUISE LINES, INC., is a foreign corporation with principal place of business in Miami, Dade County, Florida. The plaintiff's decedent was a resident of Forth Worth, Turrant County, Texas where her estate is being probated through her personal representative Amelia Flohr Heyl.

4. This is an action for the wrongful death of plaintiff's decedent, Nancy Zimmerman, and includes claims brought by the estate for estate losses and for decedent's children, Kim Ann Zimmerman, age 15; and Lisa Marie Zimmerman, age 10, per survivors.

As grounds for the above, plaintiff states that the allegations in previous paragraph 2 were inadvertently made and the justice of the cause so requires the amendment of paragraphs 2, 3 and 4.

MEMORANDUM OF LAW

Said amendment is proper under Rule 15(a) and Romero v Bethlehem Steel Corporation, 515 F 2d 1249, U.S.C.A. 5th, 7/21/75.

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished by mail, to Christian D. Keedy, Esquire, of SMATHERS & THOMPSON, 1301 Afred I. duPont Building, Miami, FL 33131, this 24th day of January, 1979.

Cone, Owen, Wagner, Nugent,
Johnson & McKeown, P.A.

507 North Olive Avenue
Post Office Box 3466
West Palm Beach, FL 33402
305/655-8100

Attorneys for Plaintiff

By /s/ Ward Wagner, Jr.
Ward Wagner, Jr.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090 Civ-CF

AMELIA FLOHR HEYL, as Representative of the Estate of Nancy Zimmerman,
Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER

(Filed February 8, 1979)

Three motions are before the Court. Plaintiff seeks to amend her complaint. Defendant has moved to strike plaintiff's demand for a jury trial and to compel production of documents.

In her complaint, plaintiff described the action as one under the general maritime law for death proximately resulting from negligence on the part of the ship's doctor while the deceased was a passenger aboard the ship at sea. The plaintiff now seeks to amend her complaint so as to base jurisdiction on diversity of citizenship and to delete the allegations of the complaint which demonstrate maritime jurisdiction. Plaintiff relies on Romero v. Bethlehem Steel Corporation, 515 F.2d 1249 (5th Cir. 1975). Reliance on Romero is misplaced. Romero involved a claim for personal injury whereas the instant cause involves a claim for death resulting from negligence committed at sea. Plaintiff's exclusive remedy is under the Death on The High Seas Act, 46 U.S.C., §§ 761-

768. A suit for death on the high seas must be brought in admiralty, 46 U.S.C., § 761, and cases decided thereunder. See Dore v. Link Belt Co., 391 F.2d 671 (5th Cir. 1968)); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1956); Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (D.C. Del. 1964); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964); and First National Bank in Greenwich v. National Airlines, 288 F.2d 621 (2d Cir. 1961).

Because admiralty is the plaintiff's exclusive remedy, plaintiff's demand for a jury trial is improper. Inspection of the file discloses that plaintiff's motion to compel production should be granted.

For the reasons stated, it is

ORDERED and ADJUDGED as follows:

(1) Plaintiff's motion to amend her complaint in a manner to disclaim admiralty jurisdiction and to invoke diversity jurisdiction is denied.

(2) Defendant's motion to strike plaintiff's demand for jury trial is granted.

(3) Defendant's motion to compel production of documents is granted.

(4) This cause will be tried as previously set on April 3, 1979.

DONE and ORDERED at West Palm Beach, Florida this 8th day of February, 1979.

/s/ Charles B. Fulton
Senior U.S. District Judge

cc: Smathers & Thompson
Cone, Owen, Wagner, Nugent, et al.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090-Civ-CF

AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, minors,
Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

PRETRIAL STIPULATION

(Filed March 8, 1979)

COME NOW, the Plaintiff, AMELIA FLOHR HEYL, and Defendant, CARNIVAL CRUISE LINES, INC. by and through their undersigned counsel, and as required by Order of this Court submit their Pretrial Stipulation.

I. NATURE OF THE ACTION

This is an action for the wrongful death of NANCY HEYL ZIMMERMAN, alleged to have been caused by the medical malpractice of the ship's doctor aboard the TSS CARNIVALE in April of 1977.

II. BASIS OF FEDERAL JURISDICTION

A. 28 U.S.C. § 1333, Admiralty and maritime case;

B. Rule 9(H) of the Federal Rules of Civil Procedure;

C. 46 U.S.C. § 761, Death on the High Seas by Wrongful Act;

D. Alleged tortious conduct occurred on the high seas;

E. Suit in admiralty.

III. PLEADINGS RAISING ISSUES

A. Plaintiff's original Complaint;

B. Answer and Affirmative Defenses;

C. Plaintiff's denial of Defendant's Affirmative Defenses;

IV. UNDISPOSED OF MOTIONS

[None.]

V. STIPULATED FACTS

A. On April 9, 1977, Plaintiffs decedent boarded the TSS CARNIVALE, which ship was operated by CARNIVAL CRUISE LINES, INC., in April of 1977.

B. Nancy Zimmerman was a fare-paying passenger aboard the TSS CARNIVALE.

C. Upon becoming ill, Nancy Zimmerman was examined and treated by the ship's physician.

D. On April 11, 1977, Nancy Zimmerman expired.

E. Nancy Zimmerman was survived by two daughters, Kim Ann Zimmerman and Lisa Marie Zimmerman.

F. AMELIA FLOHR HEYL is the administratrix of the estate of Plaintiff's decedent.

G. Nancy Zimmerman was born on January 14, 1935.

H. Kimberly Ann Zimmerman was born on May 2, 1962.

I. Lisa Marie Zimmerman was born on February 18, 1968.

J. At the time of Nancy Zimmerman's death, she was employed by the First National Bank of Euless, Euless, Texas, where she began employment on March 10, 1975, at a salary of $425 (gross) per month.

K. On July 15, 1975, she received a raise to $440 (gross) per month.

L. On January 1, 1976, she received a salary increase to $455 (gross) per month.

M. On January 1, 1977, she received a salary increase to $470 (gross) per month, which was her salary at the time of her death.

N. From November, 1972, to April, 1977, her adopted father, Burt Heyl, gave Nancy Zimmerman a total of $34,334.77. (See Plaintiff's response to Defendant's Interrogatory #5)

O. On May 21, 1973, Nancy Zimmerman was divorced from Richard Zimmerman, and custody of Kimberly Ann Zimmerman and Lisa Marie Zimmerman was awarded to Nancy Zimmerman, and Richard Zimmerman was ordered to pay monthly child support for each daughter in the amount of $105.

P. On August 17, 1976, by order of the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, Richard Zimmerman was awarded custody of Kimberly Ann Zimmerman and prior child support awarded to Nancy Zimmerman for this daughter was cancelled.

Q. Subsequent to the spring of 1976, Kim Ann Zimmerman resided with her father in Illinois. (This stipulation does not preclude the Plaintiff from offering evidence that this daughter visited her mother subsequent to that date)

R. At all times subsequent to Richard Zimmerman's divorce of Nancy Zimmerman, he paid all doctor and dentist bills for Lisa Marie and Kim Ann Zimmerman.

S. Subsequent to the divorce in 1972, Richard Zimmerman paid expenses associated with the formal education of both Lisa Marie and Kim Ann Zimmerman.

NOTE: The Plaintiff, although agreeing to the facts set out in "N", "O", and "P" above, asserts that these facts are not relevant or material to issues to be presented to the Court in this case. The Defendant's position is to the contrary.

VI. FACTS NOT ADMITTED BUT WHICH ARE NOT CONTESTED

None.

VII. ISSUES OF FACT WHICH REMAIN TO BE LITIGATED

A. Alleged negligence of Defendant;

1. Whether the ship's physician failed to properly and timely diagnose Nancy Zimmerman's condition;

2. Whether the Defendant was negligent in hiring Dr. Dreize;

3. Whether the TSS CARNIVALE was unseaworthy in not being properly equipped to care for Nancy Zimmerman.

4. Whether the Defendant failed to provide proper medical care to Nancy Zimmerman;

5. Whether the Defendant failed to provide adequate equipment and personnel to adequately diagnose and treat Nancy Zimmerman;

B. Defendant's Affirmative Defenses:

1. Time and cause of Nancy Zimmerman's death;

2. Whether Dr. Dreize negligently failed to diagnose the cause of Nancy Zimmerman's death;

3. Whether any act or omission of Dr. Dreize proximately caused and/or contributed to Nancy Zimmerman's death;

4. Whether the medical care given to Nancy Zimmerman while aboard the TSS CARNIVALE was reasonable under the circumstances;

5. Whether the medical care given to Nancy Zimmerman while aboard the TSS CARNIVALE consisted of the exercise of the degree of care and skill which physicians in the same type of practice ordinarily exercise in like cases;

6. Whether the medical care given to Nancy Zimmerman aboard the TSS CARNIVALE caused and/or contributed to her death;

7. Whether Dr. Dreize's failure, if such is proved to exist, to diagnose the cause of Nancy Zimmerman's death, proximately caused or contributed to her death.

8. Whether Nancy Zimmerman's negligence and/or other fault was the cause of her death;

9. Whether Nancy Zimmerman was Contributorily negligent;

10. Whether Nancy Zimmerman failed to give Dr. Dreize an accurate history (comparative negligence);

11. Whether Nancy Zimmerman failed to cooperate with Dr. Dreize and/or Nurse Rubins in their medical treatment of her (comparative negligence);

12. Whether Carnival Cruise Lines is legally liable to the Plaintiff for the acts and/or omissions of Dr. Dreize;

13. The nature and amount of damages which the Plaintiff has sustained, if any.

VIII. ISSUES OF LAW ON WHICH THERE IS AGREEMENT

A. This action is brought pursuant to the Death on the High Seas Act, 46 U.S.C. § 761-768;

B. The law applicable to damages is governed by 46 U.S.C. § 761-762;

C. The law applicable to comparative negligence is governed by 46 U.S.C. § 766;

D. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are applicable to this case.

E. The doctrine of comparative negligence applies here.

IX. ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY COURT

A. Whether Nancy Zimmerman was entitled to a "warranty of seaworthiness";

B. Whether as a matter of law Carnival Cruise Lines would be responsible for the negligence of Dr. Dreize.

X. SCHEDULE OF EXHIBITS AND OBJECTIONS BY COUNSEL

A. Plaintiff's Exhibits';

B. Defendant's Objections to Plaintiff's Exhibits;

C. Defendant's Exhibits;

D. Plaintiff's Objections to Defendant's Exhibits.

XI. SCHEDULE OF WITNESSES

See attached lists of Plaintiff and Defendant.

XII. ATTORNEYS TO TRY THE CASE ARE:

A. John F. Romano, Esq. and Ward Wagner, Jr., Esq., Cone, Owen, Wagner, Nugent, Johnson & McKeown, P.A. for Plaintiff;

B. Christian D. Keedy, Esq., and Elizabeth Hook, Esq., Smathers & Thompson, for Defendant.

XIII. ESTIMATED TRIAL TIME

Four-Five days.

XIV. DISCOVERY
OPEN UNTIL 29 MARCH, 1979

XV. EXPERT REPORTS TO BE
EXCHANGED AND/OR DEPOSITIONS TAKEN

SMATHERS & THOMPSON
Attorneys for Defendant
1301 A.I. duPont Building
Miami, Florida 33131
(305) 379-6523

By /s/ Christian D. Keedy
Christian D. Keedy

DATED: March 7, 1979

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By /s/ John F. Romano
John F. Romano

DATED: March 12, 1979

NOTE: The additional pages of the Pretrial Stipulation consisting of Witness and Exhibit Lists (R. 217-225) have been omitted from this Appendix.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3957
Summary Calendar*

AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, minors,
Plaintiff-Appellant,

versus

CARNIVAL CRUISE LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 20, 1980)

Before TJOFLAT, FRANK M. JOHNSON, JR. and GARZA, Circuit Judges.

PER CURIAM:

On April 9, 1977, Nancy Zimmerman, age 42, boarded the Appellee's luxury cruiseliner, the

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*Fed. R. App. P. 34(a); 5th Cir. R. 18.

TSS Carnivale. She was a farepaying passenger taking a pleasure cruise out of the Port of Miami. Mrs. Zimmerman became ill, and was examined and treated by the ship's physician. On April 11, she was discovered dead in her cabin. The Carnivale was on the high seas.

This suit was filed by Amelia Flohr Heyl as Administratrix of Mrs. Zimmerman's estate and guardian of her two daughters. In the original complaint, Plaintiff alleged the Death on the High Seas Act [DOHSA], 46 U.S.C. § 761 et seq., and the General Maritime Law as bases of federal jurisdiction. A jury trial was requested. In its answer, Defendant Carnival denied the allegations of jurisdiction except as they pertained to admiralty and maritime jurisdiction.

Plaintiff subsequently filed a motion seeking leave to amend the complaint to substitute diversity as the basis of federal jurisdiction. The Defendant opposed the motion and the District Court ruled that Plaintiff's exclusive remedy was under DOHSA, thus being in admiralty and a nonjury matter. Leave to amend was denied.

Pursuant to a pretrial order, the parties' counsel jointly prepared and filed a pretrial stipulation. The Plaintiff and Defendant stipulated admiralty as the basis of federal jurisdiction, and DOHSA as the controlling law.

After a bench trial, the district found for the Defendant, stating that Plaintiff had failed to prove that the Defendant or its agents were guilty of negligence which caused the death of the Plaintiff's decedent.

Plaintiff filed a motion for a new trial, solely on the basis of the District Court's denial of the motion to amend to allege diversity jurisdiction.

The motion for new trial was denied, and Plaintiff appeals. We affirm.

In Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), the Supreme Court held that DOHSA provides the exclusive remedy for death on the high seas. See also Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71, 75 (5 Cir. 1980). The District Court did not err in overruling the motion for leave to amend. Since this was, accordingly, a DOHSA case, it was properly tried in admiralty without a jury. See Romero v. International Terminal Operating Co., 358 U.S. 354, 371, n. 28 (1959).

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 79-8090-Civ-CF

AMELIA FLOHR HEYL, etc.,
Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER

(Filed March 23, 1979)

This cause is before the Court on plaintiff's motions to amend her complaint. Each motion is addressed seriatim.

PLAINTIFF'S RENEWED MOTION
TO AMEND HER COMPLAINT

At the pre-trial conference in this cause, plaintiff orally renewed her motion to amend her complaint. An earlier motion by plaintiff to amend here complaint to bring this action under diversity jurisdiction and to try the case to a jury was denied by this Court on February 8, 1979. At the pre-trial conference, plaintiff's counsel renewed the motion to amend, however, this time seeking to bring the action under "general maritime law," and to try the cause to a jury.

Plaintiff's renewed motion to amend her complaint is, in effect, a renewed request for a trial by jury. Plaintiff has already plead general

maritime jurisdiction, and the parties have stipulated that that is a basis for jurisdiction in this cause. Under the doctrine of Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), a federal remedy for wrongful death does exist under general maritime law. The question presently before the Court is whether plaintiff is entitled to a jury trial in an action for wrongful death brought under the general maritime law.

In 1920 Congress enacted the Death on the High Seas Act (DOHSA), 41 U.S.C. § 761 et seq., with the intent of creating a remedy for wrongful deaths more than three miles from shore. The Act did not address claims arising in territorial waters, and such claims were governed by state wrongful death statutes. This resulted in a lack of uniformity and a general uncertainty in the law, in that different sbustantive rules applied depending upon whether a claim arose in territorial waters or on the High Seas. In an effort to resolve this inconsistency, the Court in Moragne established a right of action under general maritime law when a wrongful death occurred in territorial waters. Subsequent decisions in this Circuit have extended the Moragne doctrine to wrongful death claims arising on the high seas as well as in territorial waters. See Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975).

However, wrongful death claims brought under general maritime law have no greater rights than those under DOHSA. In Green v. Rosai, 481 F.2d 102 (5th Cir. 1973), the Court considered the question of plaintiff's right to a jury trial in a Moragne action and concluded that a jury trial was not available unless some independent jurisdictional base could be established. Id at 103. More recently, the Supreme Court employed a similar rationale in holding that no

greater damages are available in a Moragne wrongful death claim than in a DOHSA claim, Mobil Oil Corp. v. Higginbotham, 98 S.Ct. 2010 (1978). The Court in Higginbotham concluded:

> In the area covered by the statute, [the DOHSA] it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

It is equally inappropriate to permit a jury trial in a Moragne claim, when one is not available in a DOHSA claim. Plaintiff's renewed motion to amend is therefore denied. The Court's Order of February 8, 1979 is, however, amended to delete the reference to the Death on the High Seas Act as the plaintiff's exclusive remedy. The remedy under DOHSA is co-extensive with the general maritime remedy afforded by Moragne. Neither avenue of relief affords plaintiff a jury trial.

PLAINTIFF'S MOTION TO AMEND COMPLAINT TO BRING A PENDANT CLAIM

At the pre-trial conference, plaintiff filed a motion seeking to amend her complaint to include a claim for the decedent's pain and suffering. Plaintiff relies on Solomon v. Warren, 540 F.2d 777, 792 (5th Cir. 1976) in support of her motion. In the Solomon case the claim for pain and suffering was brought under Florida Statute 46.021 as a pendant claim to plaintiff's claim under DOHSA. In the present case, as in Solomon, a claim for pain and suffering would have to be brought as a separate claim, invoking pendant jurisdiction. It is not simply an additional "element of damage" as plaintiff's memorandum suggests.

Defendant opposes plaintiff's motion on the grounds that the insertion of an additional claim, requiring additional discovery, would be prejudicial at this stage of the law suit.

The Court finds defendant's argument persuasive. The complaint in this cause was filed nearly one year ago. The case has been at issue for over seven months. A pre-trial stipulation has already been filed by the parties limiting the issues to those raised by the original complaint and answer. To add a pendant state law claim raising new issues and further discovery on the eve of trial would disrupt and delay the trial of this cause.

Accordingly, for the reasons set forth herein, it is

ORDERED and ADJUDGED that plaintiff's motions to amend her complaint are denied.

DONE and ORDERED at West Palm Beach, Florida, this 23 day of March, 1979.

/s/ Charles B. Fulton
Senior District Judge

cc: Cone, Owen, Wagner, et al.
Smathers & Thompson

Supreme Court, U.S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-565

In the Supreme Court of the United States

October Term, 1980

AMELIA FLOHR HEYL, As Personal Representative of the Estate of Nancy Zimmerman, Deceased, and As Guardian of Kim Ann Zimmerman and Lisa Marie Zimmerman, Minors,
Petitioner/Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Respondent/Defendant.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

Please refer to the Statement in the Petition for Certiorari.

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 22 (5), Petitioner submits this Reply Brief addressed to arguments first raised in Respondent's Brief in Opposition.

I.

Respondent argues that actual diversity of citizenship has never been established, so there is no proper record for this Court to determine whether Petitioner/Plaintiff could have brought the suit in diversity rather than in admiralty. It should be noted, however, that the trial court denied Plaintiff's requested amendment to the Complaint for only one reason; the Court was of the opinion that the requested amendment, even if granted, would be futile since Plaintiff would still not be entitled to a trial by jury because the death occurred on the high seas. The Fifth Circuit Court of Appeals agreed.

It has never been disputed, and Respondent still does not dispute, that there is, in fact, complete diversity of citizenship between Petitioner/Plaintiff and Respondent/Defendant. The issue in this case has always been simply whether the requested amendment to the Complaint would be futile.

The trial court mentioned for the first time in its order denying a new trial that Plaintiff's proposed amendment to the Complaint only alleged "residency" of the parties rather than "citizenship." We acknowledge that,

in this respect, the proposed amendment was technically defective in that "citizenship" rather than "residency" should have been alleged and the proposed amendment should have specified the Defendant's particular place of incorporation rather than merely allege Defendant to be a foreign corporation. *DeLome v Union Barge Line Co.*, 444 F.2d 225 (5th Cir. 1971); *McGovern v American Airlines, Inc.*, 511 F.2d 653 (5th Cir. 1975). However, until the trial court mentioned this in its order denying a new trial Plaintiff was not on notice of this technical defect. Neither the Defendant nor the trial court noticed this technical defect until after the non-jury trial when the Motion for New Trial was being considered. If put on notice earlier Plaintiff would certainly have cured this minor problem as it would have been a very simple matter to do so.

It is well settled that a Complaint which fails to properly aver "citizenship" can be easily cured by amendment and the courts should liberally allow the opportunity to do so, both at the trial and appellate level; especially when Plaintiff was not previously on notice of the defect. 28 USC §1653; *McGovern*, supra; *Howard v DeCordova*, 177 US 609, 20 S.Ct. 817 (1900); *Burnstein v Columbia Broadcasting System, Inc.*, 291 F.2d 8 (7th Cir. 1961); *Texaco-Cities Service Pipe Line Co. v Aetna Cas. & Sur. Co.*, 283 F.2d 144 (8th Cir. 1960); *Mantin v Broadcast Music, Inc.*, 244 F.2d 204 (9th Cir. 1957); *Molnar v Nat'l. Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); *Shriner v Strong*, 229 F.Supp. 71 (N.D. Ill. 1964); *Kelly v Kentucky Oak Mining Co., Inc.*, 491 F.2d 318 (6th Cir. 1974); *Hunt v Penn Central Transp. Co.*, 414 F.Supp. 1157 (W.D. Pa. 1976).

Often an amendment is not even necessary if the record on the whole establishes the existence of the re-

quired diversity of citizenship between the parties. *Nat'l. Farmers Union Property & Cas. Co. v Fisher,* 284 F.2d 421 (8th Cir. 1960); *Baer v United Services Auto Ass'n.,* 503 F.2d 393 (2d Cir. 1974); *Smith v Dealers Transit, Inc.,* 239 F.Supp. 605 (E.D. Tenn. 1965).

Here, the record reflects that the deceased resided in Texas since 1974 until her death in 1977 and was employed at a Texas bank since 1975. (R. 107, 110, 212).[1] She was in fact a Texas citizen and her estate is being probated in Texas. The Plaintiff, Amelia Flohr Heyl, is the natural mother of the deceased and a personal representative of the estate. (R. 39). The record establishes that Amelia Flohr Heyl and her husband, Bert Heyl, are residents of Texas. (R. 222). On remand Plaintiff would prove she is also a "citizen" of Texas. Defendant is aware of this since it has copies of all documents appointing Mrs. Heyl personal representative in Texas (R. 38) and it even took Bert Heyl's deposition in Texas. (R. 61). If necessary Petitioner could supplement the record to include Mrs. Heyl's deposition or trial testimony which would possibly reveal further that she is a Texas citizen. However, this does not seem necessary in order to remand this cause for further proceedings on a diversity theory since Plaintiff would then be put to this burden of proof anyway.

It would only destroy diversity if Defendant corporation was a Texas citizen. Defendant admitted in its answer (R. 28) that it is a foreign corporation doing business in Florida, with a business office in Miami, Florida. Plaintiff has alleged that Defendant's principal place of business

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1. The original record on appeal has been certified and transmitted to this Court. Accordingly, Petitioner will herein cite directly to the record rather than supplementing this brief with another Appendix.

is in Miami, Florida. This would make Defendant a Florida citizen for diversity purposes. 28 USC §1332 (c). Defendant is also a citizen of any state in which it has been incorporated. The record does not now reflect where Defendant was incorporated because Plaintiff was not permitted to allege diversity of citizenship jurisdiction by amendment to the Complaint. It would only destroy diversity if Defendant was incorporated in Texas. If this was the case Defendant would surely have opposed Plaintiff's requested amendment to the Complaint by simply stating that Defendant was a Texas corporation. Defendant did not and could not do this because Defendant, in fact, was not a Texas corporation.

Respondent also correctly argues that in a wrongful death diversity case such as this it is the citizenship of the personal representative of the estate, and not the citizenship of the decedent, that is relevant for purposes of establishing diversity. Respondent then correctly points out that the proposed amendment to the Complaint alleges the residence of the deceased rather than the citizenship of the personal representative. This was a defect which was not observed by anyone at the trial level. We admit this is another technical defect in our proposed amendment; however, this defect is also easily curable as is the other defect mentioned by the trial court for the first time in its order denying a new trial. If the only problem at the trial level were such technical defects as these the trial court would surely have allowed the defects to be cured by proper allegations, but this was not the problem that concerned the trial court or the Fifth Circuit. The trial court specifically stated that even if diversity was properly alleged the Motion to Amend the Complaint would still have been denied because of the Court's belief that Plaintiff's exclusive remedy was in admiralty; and the Fifth Circuit agreed.

The record does establish at least a probability of diversity of citizenship. Petitioner would request leave to cure the technical defect by amending the allegations to state that Plaintiff is a citizen of Texas as was Plaintiff's decedent, and Defendant is a corporation, a citizen of and incorporated only in Panama and Connecticut (not in Texas) at the time the Complaint was filed and has its principal place of business in Miami, Florida. Since the technical defect was not noticed by anyone until after trial was completed, this is an appropriate case to allow leave to amend, upon remand to the trial court, to cure the defect. It is "contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v Davis,* 371 US 178, 83 S.Ct. 227 (1962). This Court has the power to remand and direct the trial court to allow Plaintiff to amend its complaint to correct a defective allegation of jurisdiction. 28 USC §1653. Leave to amend defective allegations of subject matter jurisdiction should be freely given even after judgment has been entered or an appeal taken. *Eklund v More,* 410 F.2d 731 (5th Cir. 1969); *John M. Peters Const. Co. v Marmar Corp.,* 329 F.2d 421 (6th Cir. 1964).

Respondent argues that the record does not prove that diversity of citizenship actually exists in this case. However, this is only because the trial court did not allow Plaintiff to amend its Complaint to allege diversity jurisdiction, therefore the issue was not listed in pretrial stipulation since it was not an issue for trial. It was not an issue for trial because of the Court's order which limited Plaintiff to admiralty jurisdiction under D.O.H.S.A., therefore it would have been irrelevant for Plaintiff to prove diversity of citizenship at trial.

It should be apparent that the reason the record does not prove actual diversity is because the trial court refused to allow Plaintiff to even allege diversity jurisdiction, and that is now the issue. Respondent's argument seems to be putting the cart before the horse; the allegations must come first and then the supporting evidence. On remand with instructions to allow Plaintiff to proceed strictly on a diversity theory of jurisdiction, Defendant would be entitled to a dismissal of the Amended Complaint if Plaintiff could not support the allegations of diversity of citizenship with any evidence. Once again, Defendant does not even now deny that diversity does in fact exist; Defendant only argues that the record does not prove it but this is because Plaintiff was not even permitted to allege it. As a practical matter it would be curious indeed for Plaintiff to incur the expense of appealing to the Fifth Circuit and petitioning this Honorable Court for certiorari if Plaintiff could not prove on remand that diversity of citizenship actually exists.

II.

Respondent argues that Petitioner has waived the issue of diversity jurisdiction because the pretrial stipulation stated admiralty as the sole basis of federal jurisdiction. Respondent has presented this argument previously to both the trial court and the Fifth Circuit as a reason for not reaching the merits, and neither Court was persuaded.

A review of the proceedings in this case demonstrates clearly that Plaintiff never voluntarily waived the issue regarding the right to trial by jury and did everything reasonably possible to present the issue to the trial court, on more than one occasion, and thus preserve the issue for appeal.

In the original Complaint Plaintiff demanded trial by jury (R. 4) and jury trial was initially scheduled (R. 42) until Defendant objected. (R. 46-48). Plaintiff then responded (R. 78) and moved to change the basis of federal jurisdiction to diversity of citizenship in order to receive a jury trial. (R. 79-81). The controversy was then at issue and was briefed by both parties.

The trial court denied Plaintiff's Motion to Amend and rescheduled the case for a non-jury trial. (R. 90-91). This order was entered February 8, 1979, and the Court specifically stated, "Plaintiff's exclusive remedy is under the Death on the High Seas Act." No suggestion was made to raise the issue again for reconsideration.

The pretrial stipulation was filed on March 8, 1979. (R. 210). This was one month after the February 8 order (R. 90-91) which specifically instructed Plaintiff that her exclusive remedy and basis for federal jurisdiction was D.O.H.S.A. and she could *not* base jurisdiction on diversity. Therefore, Plaintiff had no other choice at that time but to accept the court's ruling and indicate on the pretrial stipulation that the basis of jurisdiction was in admiralty under D.O.H.S.A. (R. 210). What else was the Plaintiff to do?

Defendant now considers this a voluntary waiver of the entire issue but it clearly was not. Defendant now implies that Plaintiff should have continued to rely on diversity jurisdiction in the pretrial stipulation, even at the cost of antagonizing the trial judge who had just a few weeks earlier ordered the Plaintiff that she could *not* rely on diversity, in order to preserve this issue for appeal. Of course if Plaintiff did this the Defendant would have quickly pointed out to the trial Judge that Plaintiff was refusing to abide by the Court's order. (For example, see R. 255).

Everyone was aware that Plaintiff had not abandoned her desire for trial by jury. Even at the pretrial conference Plaintiff again orally moved to amend the Complaint so she could obtain a jury trial and the Court ordered Defendant to respond. Defendant filed a written response to Plaintiff's renewed Motion (R. 255-257) which argued that Plaintiff waived the issue in the pretrial stipulation. The trial court was aware that Plaintiff never intended to abandon the issue by framing the pretrial stipulation in accordance with the Court's February 8 order. Therefore, the Court did not deny Plaintiff's renewed Motion on the basis that the issue was waived by pretrial stipulation, indeed the Court did not even address this argument. (But see R. 263 where the Court accepted this waiver argument on another unrelated issue.) The Court denied Plaintiff's renewed Motion *on its merits*. (R. 261-262).

After trial and an unfavorable memorandum opinion written by the Court Plaintiff timely moved for a new trial and again argued that the Court erred by refusing to allow Plaintiff to amend its Complaint to allege only diversity jurisdiction and erred by denying a trial by jury. (R. 450-458). Defendant filed a memorandum in opposition (R. 459-462) which abandoned their "waiver" argument because by now it was clear the trial court would reject this argument. The Defendant's memorandum argued the merits and the Court's order denying a new trial (Supp. R) went to the merits and was based on the Court's belief that Plaintiff could only proceed in admiralty under D.O.H.S.A.

Plaintiff has done everything reasonably possible to preserve this issue for review and yet abide by the trial court's orders when the case was still at the trial level. According to Defendant's reasoning, Plaintiff would have to

ignore the trial court's February 8 order and belabor the issue in the pretrial stipulation (which is supposed to narrow the issues for trial) in order to preserve the question for appellate review. Defendant has not cited a single case which states that a party in a pretrial stipulation must continue to belabor an issue which has already been ruled upon by the Court or else be deemed to have waived his right to appeal from the adverse pretrial order.

A pretrial stipulation is drafted with a view as to what the proof will be at trial and the pretrial order permits the parties and the Court to prepare for trial knowing what issues they must be ready to meet; thus, the failure to include in the pretrial order an issue which remains to be resolved at trial may preclude the offer of proof at trial on that issue, but it is not a waiver for all purposes. *Pacific Indemnity Co. v Broward County*, 465 F.2d 99 (5th Cir. 1972).

Here it was already known that there would be no reason to prove diversity of citizenship at trial because the Court had already ruled that Plaintiff could not proceed on that theory of jurisdiction. Thus, there was no reason to include it in the pretrial stipulation as an issue which remains to be resolved at trial, however, this certainly does not waive the issue for purposes of appeal. To accept Defendant's argument that a party must include in the pretrial stipulation all issues already ruled upon in order to preserve them for appellate review would defeat the usefulness of the pretrial order as a device to reduce and narrow the issues for trial. Cf. *Pacific Indemnity Co.*, supra.

Moreover, Fed. R. Civ. P. 16 states that the Court shall make an *order* regarding the action taken at pretrial conference and such an *order, when entered,* controls the

subsequent course of the action unless modified. Here there was no *order* which adopted the parties' pretrial stipulation and Rule 16 does not say that pretrial stipulations alone, without a court order approving the same, control the subsequent course of action unless modified.

Based on the foregoing, the Respondent's argument that the issue presented to this Court has been waived or is not properly preserved by the record is without merit and has not persuaded any of the previous Judges that have considered this case.

III.

Respondent states (at pages 2 and 10 of its Brief in Opposition) that Plaintiff stipulated in the pretrial stipulation that the alleged negligent conduct occurred on the high seas, and Respondent cites R. 210. This is a misreading of the pretrial stipulation. Plaintiff has always agreed that the alleged negligent acts of the ship physician and nurse occurred on the high seas. The stipulation at R. 210 that the tortious conduct occurred on the high seas should be read in conjunction with paragraph I on R. 210 to mean that the medical malpractice of the physician occurred on the high seas. But this was not the only issue for trial. The pretrial stipulation also states at R. 213 that other issues of fact for trial were whether Defendant was directly negligent in hiring the ship physician and equipping the ship with inadequate medical facilities and personnel. Clearly the acts giving rise to vicarious liability occurred on the high seas but the acts giving rise to direct liability did not.

IV.

Respondent, at page 12 of its Brief in Opposition, states that Petitioner does not invoke any particular state

wrongful death remedy and therefore admiralty is the only remedy available since there is no other substantive law to apply in a State Court which could be removed to Federal Court on diversity jurisdiction.

This case has never yet reached the stage where we have to determine exactly what substantive law the Federal District Court would apply on diversity of citizenship jurisdiction. This issue is not now before this Court since the trial court denied the proposed amendment to the Complaint on the sole ground that Plaintiff's exclusive remedy must be sought in a Federal Admiralty Court under D.O.H.S.A. because D.O.H.S.A. preempts all other remedies (even assuming there would otherwise be another viable remedy). This, then, is the only issue for this Court to consider.

Speaking academically, it would seem that D.O.H.S.A. was not intended to preempt remedies under State Wrongful Death Statutes. See 46 USC §767; *Safir v Compagnie Generale Transatlantique,* 241 F.Supp. 501 (E.D. N.Y. 1965) and cases cited therein; *Sierra v Pan American World Airways,* 107 F.Supp. 519 (D. Pr. 1952); *Ledet v United Aircraft Corp.,* 10 N.Y.2d 258, 219 N.Y.S.2d 245, 176 N.E.2d 820 (1961). See also *Just v Chambers,* 312 US 383, 61 S.Ct. 687 (1941). In a diversity of citizenship case in Federal District Court for the Southern District of Florida, the federal court, under the Erie Doctrine, would apply the substantive law of the forum state which would necessitate an inquiry into Florida's choice of law doctrine. See *Klaxton Co. v Stentor Mfg. Co.,* 313 US 487, 61 S.Ct. 1020 (1941); *Westerman v Sears, Roebuck & Co.,* 577 F.2d 873 (5th Cir. 1978). Just a few weeks ago the Florida Supreme Court discarded the previously recognized lex loci delicti doctrine in favor of the more flexible "significant relationships" test to determine choice of law. *Bishop*

v Fla. Speciality Paint Co., ... So.2d ..... (Fla. Sup. Ct. Case No. 58,372, opinion filed October 23, 1980). There is not yet any Florida case law under this new approach and it is possible a Florida Court (and thus the Federal District Court) would apply Florida law, or Texas law, or perhaps the substantive law of some other jurisdiction which has a more significant relationship such as the "law of the flag," or possibly even general maritime law or the *substantive* law under D.O.H.S.A. (in which case it would only be the *substantive* law under D.O.H.S.A. while the *procedure* would still be the civil procedure applicable to diversity of citizenship cases, rather than admiralty procedure. See *Safir*, supra; *Sierra*, supra; *Ledet*, supra).

There are a number of possibilities, however, the important point is that this question has not yet been considered by the lower courts in the present case and therefore it would not seem appropriate for this Court's consideration since any opinion at this stage would be merely an advisory opinion.

CONCLUSION

This Honorable Court should issue its discretionary Writ of Certiorari and order the parties to file briefs on the merits for plenary consideration. Alternatively, since neither party in this case could resist the temptation to argue the merits in these jurisdictional briefs, this case seems to be ready for plenary consideration at this point without the need for supplemental briefs on the merits. Since the original Record on Appeal has already been certified and transmitted to this Court, this Court already has full access to our respective positions on the merits by virtue of our jurisdictional briefs supplemented by our

briefs filed with the Fifth Circuit Court of Appeals. This perhaps would be more expeditious and less expensive.

Respectfully submitted,

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and

RICHARD A. KUPFER

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that three copies of the foregoing Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served by First Class U.S. Mail on all parties required to be served, to-wit: CHRISTIAN KEEDY, ESQ., Smathers and Thompson, Counsel for Respondent Carnival Cruise Lines, Inc., 1301 Alfred I. duPont Building, Miami, Florida 33131, this 20th day of November, 1980.

A. WARD WAGNER, JR.
RICHARD A. KUPFER